In the Supreme Court of the United States

October Term, 1970

No. 957 and No. 6018

UNITED STATES OF AMERICA, ET AL, PETITIONERS

v.

THE PULLMAN COMPANY

EARL A. LOVE, PETITIONER

v.

THE PULLMAN COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RELEVANT DOCKET ENTRIES

1968	
May 28	Filed Complaint
June 19	Filed Answer
October 3	Appointment of Hugh J. McClearn as counsel
November 4	Filed Amended Complaint
December 3	Filed Motion to Dismiss
1969	
February 28	Order entered granting Motion to Dismiss
March 12	Notice of Appeal
April 24	Motion by EEOC to file brief *Amicus Curiae* and Order granting same
September 22	Original Opinion and Judgment
October 6	Petition for rehearing *en banc*
October 9	Motion for Leave to Intervene by EEOC
November 7	Motion for Leave to Intervene by United States
1970	
January 1	Order granting Motion of EEOC and United States to Intervene and for rehearing
July 30	Opinion on rehearing and Judgment

United States District Court
District of Colorado

Civil Action No. C-899

[Filed Nov. 4, 1968, G. Walter Bowman, Clerk]

EARL A. LOVE *Plaintiff,* vs. THE PULLMAN COMPANY, an Illinois corporation, *Defendant.*	AMENDED COMPLAINT

1. This action is based on the provisions of 42 U.S.C. Sec. 2000 e, et seq., commonly referred to as the 1964 Civil Rights Act. Subject matter jurisdiction is conferred upon this Court by 42 U.S.C. Sec. 2000 e-5(f).

2. Plaintiff is now and for the past forty-two years has been employed by Defendant as a porter. Since about 1951, Plaintiff has been qualified under Defendant's employment classification system to act as a porter in charge. Plaintiff has and continues to act as a porter in charge when called upon to do so by Defendant. Plaintiff is a Negro. Plaintiff is presently assigned to Defendant's Denver Division office. The unlawful employment practices of which he complains are being committed on a continuing basis in the State of Colorado. The employment records relevant to such practices or some of them are maintained and administered in the State of Colorado.

3. Defendant is an Illinois corporation engaged in an industry affecting commerce and during all times material to this action has employed more than 100 employees for each working day in each of twenty or more calendar weeks in each year material to this action.

4. This action is brought on behalf of Plaintiff as well as on behalf of each and all other persons similarly situated who are employed by Defendant and classified as porters in

charge. Such persons number in the thousands and are located in all parts of the United States and, therefore, are so numerous as to make it impracticable to bring them all before the Court. The right which is the subject of this action, is common to all of Defendant's employees who are classified as porters in charge and there are questions of law and fact common to all such persons. The claim of Plaintiff is typical of the claims of all such persons and Plaintiff will fairly and adequately protect the interests of all members of the class.

A. This action is maintainable under Rule 23 (B)(1)(A) because prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendant.

B. This action is maintainable under Rule 23 (B)(2) because Defendant has already refused to act on grounds generally applicable to the class when asked to do so by the Equal Employment Opportunity Commission thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

C. This action is also appropriately brought under Rule 23 (B)(3) because questions of law and fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

5. The job classifications of porter and porter in charge used by Defendant within the United States are now and always have been all Negro classifications. The job classification of conductor used by the Defendant within the United States was an all white classification until after the effective date of the 1964 Civil Rights Act and remains substantially such today. Plaintiff and those similarily situated, when acting as porters in charge, perform the same duties and assume the same responsibilities as conductors. Porters in charge must be ready at all times to act as conductors. There is now and always has been a significant pay differential between the pay of a conductor and the pay of a porter in charge.

6. Plaintiff filed a written charge under oath with the Equal Employment Opportunity Commission in which he claimed to be aggrieved by Defendant because he received lower wages as a Negro classified as a porter in charge than a white person classified as a conductor received for performing the same duties and assuming the same responsibilities.

7. The Equal Employment Opportunity Commission advised Plaintiff that it had found reasonable cause existed to believe that he was being discriminated against by the Defendant in violation of the 1964 Civil Rights Act. On May 3, 1968, the Commission notified Plaintiff that it had been unsuccessful in obtaining Defendant's voluntary compliance with the 1964 Civil Rights Act and advised him that he had 30 days within which to institute suit and that he was authorized to request the appointment of an attorney to represent him and to commence suit without the payment of fees, costs or security.

WHEREFORE, Plaintiff demands judgment against Defendant enjoining it from continuing its racially discriminatory job classification system, a money judgment in the amount that Plaintiff and each of the other persons similarly situated would have received had they not been discriminated against because of their race, attorneys' fees, costs and such other relief as the Court believes proper.

PLAINTIFF'S ADDRESS:
1511 East 29th Avenue
Denver, Colorado 80205

HUGH J. McCLEARN
/s/ Hugh J. McClearn
Attorney for Plaintiff
1950 Western Federal Savings Building
Denver, Colorado 80202
Telephone: 222-3737

CONSENT TO FILING OF AMENDED COMPLAINT

Defendant consents to the filing of this Amended Complaint.

NEEF, SWANSON AND MYER
/s/ Edward C. Eppich
Attorneys for Defendant
1908 Tower Building
1700 Broadway
Denver, Colorado 80202
Telephone: 825-6271

United States District Court
District of Colorado

Civil Action No. C-899

[Filed Dec. 3, 1968, G. Walter Bowman, Clerk]

EARL A. LOVE, *Plaintiff,* vs. THE PULLMAN COMPANY, an Illinois corporation, *Defendant.*	MOTION TO DISMISS

COMES Now the defendant, The Pullman Company, by and through its undersigned attorneys of record and moves this court to dismiss the plaintiff's amended complaint with prejudice and enter judgment in favor of the defendant, The Pullman Company, and as grounds for this motion it is shown unto the court:

1. The plaintiff's cause of action is allegedly based on Title VII of the Civil Rights Act of 1964 (42 USCA Section 2000e-5 et seq.), and jurisdiction of this court is allegedly conferred by 42 USCA 2000e-5(f).

2. Plaintiff has not complied with the jurisdictional prerequisite required by 42 USCA, Section 2000e-5(b) and has not exhausted his state administrative remedies as therein set forth.

3. Any charge filed by the plaintiff with the Equal Employment Opportunity Commission was not timely filed in accordance with the provisions of 42 USCA, Section 2000 e-5(d).

4. Plaintiff voluntarily resigned his position with the

defendant, The Pullman Company, on November 17, 1968, and hence this cause of action has become moot.

NEEF, SWANSON AND MYER
/s/ Edward C. Eppich
Attorneys for Defendant
1908 Tower Building
1700 Broadway
Denver, Colorado 80202
Telephone: 825-6271

HUGH J. MCCLEARN, attorney of record for the plaintiff, hereby acknowledges receipt of the defendant's Motion to Allow Late Filing and to Dismiss the plaintiff's amended complaint, and hereby consents to the granting of the Motion to Allow Late Filing.

/s/ Hugh J. McClearn
Attorney for Plaintiff
1950 Western Federal Savings Bldg.
Denver, Colorado 80202
Telephone: 222-3737

ORDER

On motion of the defendant it is hereby ordered that the defendant be granted leave to file the Motion to Dismiss the plaintiff's amended complaint hereto attached.

DATED at Denver, Colorado, this 3rd day of December, 1968.

BY THE COURT:
/s/ Alfred A. Arraj
Judge.

[Entered on the docket Dec. 3, 1968, G. Walter Bowman, Clerk]

State of Colorado
Civil Rights Commission

June 1, 1966

Mr. Lee Williams
Regional Director
Equal Employment Opportunity Commission
Dallas, Texas

Dear Mr. Williams:
It has come to my attention that Mr. Love has filed a complaint against the Pullman Company through your office.

We of this office discussed this problem with Mr. Love and several other Pullman Company employees. It appears that Mr. Love lacks confidence in this Commission. He did not return to file a complaint after discussing the matter with me.

Under the circumstances we could not in good conscience accept the sixty-day deferment period and accordingly waive it. Will you proceed under the provisions of Title VII to give any relief that you can to Mr. Love.

Sincerely,

/s/ James F. Reynolds
James F. Reynolds
Director

JFR:rd

EXHIBIT A

United States District Court
District of Colorado

Civil Action No. C-899

[Filed Jan. 3, 1969, G. Walter Bowman, Clerk]

EARL A. LOVE,

Plaintiff,

vs.

THE PULLMAN COMPANY, an Illinois corporation,

Defendant.

AFFIDAVIT OF EARL A. LOVE

STATE OF COLORADO
CITY AND COUNTY OF DENVER } ss.

EARL A. LOVE, being duly sworn, deposes and states that the Xerox copy of Charge of Discrimination dated July 23, 1966, attached hereto, is an accurate copy of the document which he filled out and submitted to the Equal Employment Opportunity Commission on or about July 23, 1966, and that the letter addressed to him from Tom. E. Robles dated May 3, 1968, is the document he received in the mail shortly after May 3, 1968.

Dated: Denver, Colorado, January 3, 1969.

/s/ Earl A. Love
Earl A. Love

The foregoing Affidavit was acknowledged before me on January 3, 1969, by EARL A. LOVE.

My commission expires June 21, 1970.

Witness my hand and seal.

/s/ Helen Rayce
Notary Public

(The law requires that your charge be made under oath. You may take this paper for notarization to a notary public or other official who is authorized to administer oaths. If this is impractical, send this paper to the Commission without having it notarized. The Commission will arrange to have the oath administered to you.)

I SWEAR OR AFFIRM THAT I HAVE READ THE ABOVE AND THAT IT IS TRUE TO THE BEST OF MY KNOWLEDGE

DATE: *July 23, 1966* *Earl A. Love*
(Sign here)

Subscribed and sworn to before me this *23* day of *July*, 196*6*. *Jos L. Black*, *Field Representative EEOC*
(Name) (Title)

You need not be able to answer the questions below, but if you do know the answers, it will help the Commission to handle your complaint more quickly.

1. Have you filed a complaint about this discrimination with a State or local government agency?
   ☒ Yes ☐ No
   If you checked yes, please give the following information:

   NAME OF AGENCY: *Civil Rights Commission*

   ADDRESS: *306 State Services Building, 1525 Sherman St. Denver, Colorado 80203*

   DATE YOU FILED COMPLAINT: _____

2. If your charge is against a company or a union, does it have more than one hundred (100) employees or members?
   ☒ Yes ☐ No ☐ Do not know

Mail to:

Lee G. Williams, Regional Director
Equal Employment Opportunity Commission
1309 Main St., Dallas, Texas 75202

GSA DC 66-3074

Form approved
Bureau of the Budget
No. 124-R001

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
REGIONAL OFFICE
1309 Main St., Dallas, Texas 75202

CHARGE OF DISCRIMINATION

FILL OUT THIS FORM: (Please print or type)

YOUR NAME: *Mr. Earl A. Love* *673-5695* (telephone number)

ADDRESS: *1511 E. 29th Ave.* (Number and Street)

Denver, (City) *Colorado* (State) *80205* (Zip code)

1. Were you discriminated against in connection with employment because of

   ☒ Race or Color ☐ Religion
   ☐ Sex ☐ National Origin

2. Who discriminated against you? Give the name and address of the employer, labor organization, employment agency, or apprenticeship committee.

   NAME: *Pullman Company*
   ADDRESS: *23rd St. & Fox (West)*
   Denver, Colorado

3. When did this discrimination take place?

1	*Jun*	*46 and continuing*
Day	Month	Year

4. Please tell your story of discrimination. Explain what unfair thing was done to you.

   I have been performing the duties as an "in-charge" porter which has duties and responsibilities of a Pullman Conductor and yet I receive lower wages. I believe that I am being discriminated against because of my race.

(use more sheets if needed)

United States District Court
District of Colorado

Civil Action No. C-899

[Filed Feb. 28, 1969, G. Walter Bowman, Clerk]

EARL A. LOVE,

Plaintiff,

vs.

THE PULLMAN COMPANY, an Illinois corporation,

Defendant.

ORDER

The plaintiff's action is based upon the provisions of 42 USCA, Section 2000-e-5 et seq., commonly referred to as Title VII of the Civil Rights Act of 1964. The plaintiff alleges that he has been employed by the defendant for a number of years as a porter, and for the last several years he has been performing the duties and responsibilities of the porter-in-charge, which are commensurate with the duties and responsibilities of a Pullman conductor, yet he received lower wages due to his race.

The defendant has moved to dismiss the action on the grounds that the court lacks jurisdiction over the subject matter and that the plaintiff's cause of action has become moot. The defendant's motion is supported by the deposition of James Reynolds, Director of the Colorado Civil Rights Commission, together with the exhibits attached thereto. The record also contains facts which have been stipulated to by counsel for the parties. Accordingly, the motion to dismiss filed by the defendant will be treated as a motion for summary judgment.

Before an action may be commenced under Title VII of the Civil Rights Act of 1964, 42 USCA, § 2000-e-5 et seq., there are certain statutory prerequisites which must be met before this court has jurisdiction over the subject matter of this type of action.

It is apparent from 42 USCA, § 2000-e-5(b), that if a state has a statute which prohibits the alleged unlawful

employment practice, that no charge may be filed under the Civil Rights Act of 1964 with the EEOC until after proceedings have been commenced under the state law. The State of Colorado has such a statute (CRS 1963 80-21-1 et seq.) which has been in effect since 1957 and prohibits the type of employment practice alleged by Mr. Love. The Colorado statute (CRS 1963 81-21-7(1)) requires the filing of a written complaint with the Colorado Civil Rights Commission to commence proceedings there. The Colorado statute is recognized by the EEOC as a state law which requires deferral of the EEOC action under 42 USCA, §2000-e-5(b).

The record before the court shows that in 1963 the plaintiff did file a written complaint with the Colorado Civil Rights Commission, but apparently this claim was not resolved, at least to the plaintiff's satisfaction. Thereafter, in the summer of 1965, the plaintiff again went to the Colorado Civil Rights Commission and restated his complaint to the Commission; but no written complaint was filed at that time; however, Mr. Reynolds, the director and head of the Colorado Civil Rights Commission, did contact the defendant who stated they would promote Mr. Love to the position of a conductor, but that he would probably be laid off because of the seniority rules in effect. On July 30, 1965, the Colorado Civil Rights Commission so advised Mr. Love by letter.

It is the court's opinion that since Colorado has a state law prohibiting the discrimination alleged by the plaintiff and providing a remedy for such discrimination, that the language of 42 USCA, § 2000-e-5(b) requires that an aggrieved person exhaust his remedies through the state machinery before the EEOC and this court are conferred with jurisdiction over the subject matter. Although the plaintiff did not file a written complaint in 1965 with the Colorado Commission, he did file such a complaint in 1963. It is the court's opinion that the Colorado Civil Rights Commission treated the oral complaint in 1965 as a reopening of the 1963 matter, and that although there wasn't literal compliance with the wording of the statute there was substantial compliance. Accordingly, the court holds that the plaintiff's failure to file a written complaint in 1965 does not oust this court of jurisdiction.

42 USCA, § 2000-e-5(d) states inter alia: "In the case

of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in sub-section (b) of this section, such charge shall be filed by the person aggrieved within 210 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the state or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . ."

The Civil Rights Commission of the State of Colorado terminated its proceeding on July 30, 1965, and so notified Mr. Love. No further contact was had by Mr. Love with the State Commission. He filed his complaint with the EEOC on May 23, 1966.

It is the court's opinion that the state proceedings were effectively terminated on July 30, 1965, and that the plaintiff's period within which to file a complaint with the EEOC commenced on July 31, 1965. As Mr. Love did not file with the EEOC until May 23, 1966, it is the court's conclusion that the charge and complaint before the EEOC was not filed within the time required by 42 USCA, § 2000-e-5(d), and that the EEOC did not have jurisdiction to consider Mr. Love's charge. As Mr. Love's charge was not timely filed with that body, this court is also without jurisdiction to hear the complaint herein.

Furthermore, as to the plaintiff's claim for injunctive relief, it is obvious that inasmuch as the plaintiff has resigned his position with the defendant, which fact is admitted by the plaintiff, then the request for injunctive relief is moot.

There is no genuine issue of material fact, and the court as a matter of law concludes that the defendant's motion should be granted.

IT IS, THEREFORE, ORDERED that judgment be, and the same is, hereby granted in favor of the defendant, The Pullman Company, and that the judgment of dismissal of this action shall be entered forthwith.

ENTERED this 28th day of February, 1969.

BY THE COURT:
/s/ Alfred A. Arraj
United States District Judge

[Entered on the docket, Feb. 28, 1969, G. Walter Bowman, Clerk]

United States District Court
FOR THE District of Colorado

Civil Action No. C-899

[Filed, Apr. 17, 1969, G. Walter Bowman, Clerk]

EARL A. LOVE,
Plaintiff,

vs.

PULLMAN COMPANY,
Defendant.

OFFICIAL TRANSCRIPT

Proceedings before the HONORABLE ALFRED A. ARRAJ, Chief Judge, United States District Court for the District of Colorado, beginning at 11:00 o'clock a.m., in Courtroom A, United States Courthouse, Denver, Colorado, on the 14th day of February, 1969.

APPEARANCES:

HUGH J. MCCLEARN, Attorney at Law, Denver, Colorado, appearing for the Plaintiff.

EDWARD C. EPPICH, Attorney at Law, Denver, Colorado, appearing for the Defendant.

PROCEEDINGS

The Court: Civil Action 899, Love vs. Pullman Company. This matter is before the Court on defendant's motion to dismiss. Plaintiff appears by Mr. McClearn. Defendant appears by Mr. Eppich.

We have read and considered your briefs, gentlemen, and I propose, unless I am shown some reason why I shouldn't, to consider the motion to dismiss as a motion for summary judgment, and so with that in mind you may proceed.

All right, Mr. Eppich.

Mr. Eppich: If it please the Court, I think the first thing to take up is the statement of facts that I have submitted, so that the record is clear that these are uncontradicted

facts. I have discussed this with Mr. McClearn and I believe we can stipulate on it, can we not, that with the exception of Statement of Fact Number 1, and I am referring to the memorandum brief filed on behalf of the defendant—

The Court: Excuse me.

Mr. Eppich: Excuse me, sir?

The Court: Let me get that here. All right, now, I have it.

Mr. Eppich: What I was attempting to do there was merely set forth a summary of the plaintiff's complaint. I would submit that the complaint itself as well as the charge filed with the EEOC and submitted by affidavit by Mr. Love would speak for itself.

If Mr. McClearn has any change in semantics, I certainly would take that, but I would submit to the Court that those documents speak for themselves.

I believe we are agreed that Paragraph 2 is a stipulated fact, is that correct, Mr. McClearn?

Mr. McClearn: Yes.

Mr. Eppich: With regard to Paragraph 3, Mr. McClearn has some reservation. I submit that Paragraph 3 may not even be material here. I do, however, refer the Court to page 11 and page 14 of the deposition of James Reynolds.

The Court: All right.

Mr. Eppich: Which I believe substantiates that statement. Paragraph 4 I believe we are agreed upon. Paragraph 5 I believe we are agreed upon. Paragraph numbered 6 I believe we are agreed upon. Paragraph Number 7 I believe we are agreed upon, are we not?

In that regard, I would merely call to the Court's attention page 19 of the deposition of Mr. Reynolds, wherein it is stated: "Question: As far as you are concerned, the matter was closed in July of 1965? Answer: Yes. Question: That is unless Mr. Love wanted his job as conductor? Answer: He never contacted me, so I assume that he didn't."

What is your objection to that, Mr. McClearn?

Mr. McClearn: I just don't know.

The Court: Well, in considering the motion or I mean in considering this as a motion for summary judgment, if there is no evidence that contradicts Mr. Reynolds' statement, why, the Court would accept it, of course.

Mr. Eppich: Thank you, Your Honor.

I believe we are agreed on Number 8, that at no time did Mr. Love file a written complaint?

Mr. McClearn: During that year.

Mr. Eppich: Yes, during 1965. And, Number 9, that Mr. Love filed his complaint with the EEOC either May 23 or July 23. The record is not clear on that.

And Number 10, that Mr. Reynolds corresponded with the EEOC by Exhibit A, which, of course, speaks for itself, and, Number 11, that Mr. Love resigned his position with the Pullman Company in November of 1968.

With those facts in mind, Your Honor, I think that there is very little I can add to the memorandum brief that has been submitted.

Very briefly, it is our position that the Civil Rights Act of 1964 and the provision with which we are concerned here require before this Court has jurisdiction over the subject matter that if the state has a law that prohibits the act complained of and it is agreed that the state here does have such a law, that Mr. Love must first go to the State of Colorado and commence proceeding.

I think it is equally clear that Mr. Love did not file a written complaint with the State of Colorado as required by the state statute, which, of course, is incorporated by the Federal statute.

I think that the language is very clear that this is a jurisdictional prerequisite and goes to the matter of subject matter jurisdiction, and that in many, many cases that have been decided, primarily by the District Courts. Because of the newness of the statute, to my knowledge this question of utilization of state machinery has been before the Court three times only and on each of those three instances the Courts said the statute means what it says, that if the state has an act a man is required to comply with it and this hasn't been done. That would then mean that his claim or his charge with the EEOC is invalid, because they lack jurisdiction, so any action taken by them is for naught and accordingly this Court lacks jurisdiction.

This requirement of filing with the state isn't a procedural nothing. There is some citation that the requirement that the charge be filed with the EEOC under oath is more

of a matter of form and not substance. Frankly, I would be inclined to agree with that.

When it comes to filing a written complaint with the state, though, I don't think it is a matter of form. I think it is a matter of substance. A man has a grievance. He is certainly entitled to present it, but before he can receive meaningful action I should think that he should have to put it in writing, and this isn't an onerous thing. It does give the investigative body of the state as well as the EEOC—and I think it is significant that it is clear that the written complaint must be filed with the EEOC, although it is not necessarily so that it must be sworn to—this investigative body needs something to work with, something in black and white to take to the Commission, to take to the employer. The employer is entitled to have something in writing so he knows what he is charged with, but I do not think it is a matter of form. I think it is a matter of substance.

Also, I think it is quite clear that the act requires that this be done. It is very unequivocal.

Counsel has suggested that when Mr. Reynolds wrote the EEOC in June of 1966 that there was some sort of waiver. It didn't make sense to me either, Your Honor. I first submit that we are talking about subject matter jurisdiction. It is my understanding that subject matter jurisdiction cannot be waived, cannot even be consented to by the parties. As a matter of fact, it can be raised at any time.

Referring to Volume 1-A of Barron and Holtzoff, Section 370, I don't really think a citation of authorities is necessary. What we are talking about is jurisdiction.

As well-meaning as the civil rights director of the State of Colorado may be, as well-meaning as the EEOC may be, they are still operating under mandates of the statute, and in this particular instance it is a direction from the United States Congress. I don't think that these men nor Mr. Love nor the Pullman Company, for that matter, have the right to waive a jurisdictional prerequisite set down by the United States Congress. I think it is that simple.

Mr. McClearn hits at the fact that, well, this would kind of be a senseless thing to do because Mr. Love is before the

Colorado Commission in '63 and again before the Commission in '65 and he wasn't satisfied, so why should he have to go back and file a written complaint with them?

As I said before, I think the statute requires him to do it and that's all there is to it, but I think it is also significant to note on page 12 of Mr. Reynolds' deposition, wherein this question was asked: "Did you at this time take a written complaint from Mr. Love?" And this is referring to 1965. "Answer: At this time we did not have a written complaint because the results of the first one had been unsatisfactory."

That is—well, let me explain something else here. In pursuit of civil rights complaints, as you may be aware, through the course of the years the philosophy and outlook on discrimination has changed substantially.

In 1963, as well as in 1965, our commissioners took a straightforward legalistic kind of a look at discrimination, but beginning in 1966 and through the present—I will repeat that—beginning of 1966 and through the present, we have quite a different philosophy toward discrimination and the treatment of Mr. Love's case would be significantly different from what it was in '63 because we have recognized adopted definitions of discrimination that are substantially different.

Well, I would submit that had Mr. Love filed his complaint in '66 with the state commission rather than going directly to the EEOC that he certainly would have had a full hearing. He certainly would have had fair treatment, and I think as Congress intended the State would have had the first opportunity to straighten this matter out if there were in fact something to straighten out.

Then, of course, Mr. Love could have gone to the EEOC regardless of what the state decided because that's what the act says, but, nevertheless, he didn't go to the state.

The Court: You say he didn't go to the EEOC?

Mr. Eppich: He went to EEOC, yes, sir. Yes, he did.

The Court: How about the timing of his complaint there?

Mr. Eppich: We question that, yes, sir, for this reason, that—well, first of all, having not complied with the state machinery, it is our position he had no right to go to the EEOC anyway, but assuming that through some sort of substantial compliance or theory I haven't found in the law

books yet which pertains to this, that it be considered that Mr. Love did satisfy the substance of utilization of state machinery, I think the record is quite clear that in July of 1965, July 30th of 1965, the State of Colorado had completed whatever it was going to do for Mr. Love and so advised him. That being the——

The Court: How did they advise him?

Mr. Eppich: That's by letter dated July 30, 1965, Your Honor, and I believe that the deposition of Mr. Reynolds also states that he was orally advised of it.

The Court: Do we have that letter?

Mr. Eppich: Yes, that's Deposition Exhibit Number 1. It states as follows: "The discussion we held with the Pullman officials led to the following: Seniority is lost if a person changes categories. If an "in charge" porter becomes a Pullman conductor, he will become the lowest rank conductor and will be subjected to layoff immediately based on his new status. It was my understanding that none of your people would be interested in a pay cut. If there are those who would not object, I will be happy to pursue the case to an end."

The Court: How do you interpret that last sentence?

Mr. Eppich: Pardon me, sir?

The Court: Can you interpret that last sentence for me? I don't quite understand it. "If there are those who would not object ——"

Mr. Eppich: Yes, sir.

The Court: "I would be happy to pursue it."

Mr. Eppich: I think it boils down to this, that the Pullman Company would make the porters in charge according to Mr. Reynolds conductors, but due to the union agreements and the seniority agreements, if they become a conductor they would then go to the bottom of the seniority list.

Well, the railroads have been going, as far as passenger service, have been having a rough go of it over the years, and as a result many of the long-term conductors themselves, whether they be white or black, have been furloughed simply because the work isn't there, so the effect of it would be that a porter who had a high seniority right and was being employed, when he became a conductor, he would lose those seniority rights and this then, Mr. Reynolds

says, "We can get you the job in effect, but it is a hollow thing," but that's frankly how I interpret it.

The Court: Well, I didn't ask you how you interpreted his letter. I asked you how you interpreted the last sentence, "If there are those who would not object, I would be happy to pursue the case to the end." I don't understand.

Mr. Eppich: In other words, Mr. Reynolds—he would then get the jobs as Pullman conductors for them.

The Court: I see. I see, they would not object to being placed at the tail end?

Mr. Eppich: Yes.

The Court: Yes, all right. I wanted that——

Mr. Eppich: So, it having been terminated there, Mr. Love then has 30 days or 210 days within which to go to the EEOC. Now, whether 30 days is used or 210 days is used, he still did not file with the EEOC within the time that the statute requires.

As far as the question of mootness goes, Mr. Love has resigned his position, so certainly any injunctive relief he is seeking is clearly moot.

The Court: Yes.

Mr. Eppich: As far as his claim for back wages, the best I can say there is that conceivably there was a period in July at the best, a month, where if everything he says is correct, he would be entitled to his back wages. I think that is very close, Your Honor, to being certainly a demittimus.

I do not think that he can go beyond the effective date of the act and seek back wages. To do so would be to say, "Pullman Company, what you did up to 1965 was lawful and up to ——"

Excuse me?

The Court: Can he maintain his claim for back wages if the Court does not have jurisdiction to entertain his basic claim?

Mr. Eppich: No, sir, if the Court doesn't have jurisdiction to the basic claim, it certainly doesn't have jurisdiction to adjudicate back wages. At least, not under this proceeding.

Now, conceivably, there is some other statute or some

common law cause of action he may have, but certainly not under Title 7.

The Court: All right.

Mr. Eppich: Thank you.

The Court: Mr. McClearn.

Mr. McClearn: May it please the Court, the plaintiff, Mr. Earl A. Love, who is with me in court this morning, has worked for the Pullman Company for essentially all his adult life. He has been a porter during that period of time and while perhaps not a sophisticated man, my contacts with him indicate certainly he is a gentleman, and I think this case illustrates he certainly is a tenacious man.

He has felt for many years that he and his colleagues, all of whom are negroes and all of whom are porters working for the Pullman Company, have been discriminated against because of the fact that they were negroes. His complaint has not been that he wants to be a conductor. He has never claimed that he wanted to be a conductor. He simply has felt that he did the same work that a conductor did but didn't get paid the same wages, and that the reason he didn't get paid the same wages was that he was a negro and he wanted to get the same wages that white people did who performed the same work, be they called whatever the company wants to call them.

He sought in 1963 to get the Colorado Civil Rights Commission to entertain and rectify his complaint. The records with respect to that are not available. They apparently have been lost, but it is the clear recollection of everyone involved that he did make a complaint at that time.

He came back to the Colorado Civil Rights Commission and made another complaint in 1965, and it is everyone's recollection, clear recollection, that he did that, and in 1966 he complained to the Equal Employment Opportunity Commission.

Now, the Pullman Company was aware of all this. They were consulted, and in 1966 they were made a part of the proceedings brought by the Equal Employment Opportunity Commission.

The Federal officials in 1966 contacted the Colorado Civil Rights Commission and were advised by that body that they, the Colorado Civil Rights Commission, did not feel they wanted to entertain another complaint from Mr.

Reynolds and urged the EEOC to proceed, which they did. They investigated this matter for two years, during which time Mr. Love waited. They determined that there was probable cause to believe that the defendant in this action had discriminated against him because of his race and, as I say, during this two year period the Pullman Company was fully aware of what was going on. At no time did the Pullman Company ever object to the EEOC proceeding. At no time did they ever indicate that Mr. Love had not properly exhausted whatever rights he had under the Colorado Civil Rights Act.

The Pullman Company was asked to conciliate and refused to do so. Pursuant to the statute, Mr. Love then was notified by the EEOC that he had 30 days within which to negotiate an action in this court. He did so, and has proceeded as best he can to assert his claim. He has tried that at the state level. He has tried it with the Federal administrative level and now he seeks to do it here.

Now, some six years after he initially tried to get this claim going, the defendant wants him to be thrown out of this court because he didn't or perhaps someone back down the line in the administrative process didn't fill out whatever papers the defendant thinks are appropriate.

Well, I do not think that there is any jurisdictional question before this Court.

The Court: Well, there certainly is one with reference to his not having filed the complaint with 210 days from the June 30th of '65 date. That is, file a complaint with the EEOC.

Mr. McClearn: Your Honor, the nature of our claim, may I reiterate, is not that Mr. Love was discriminated against on any particular day. Mr. Love is complaining and his allegation is that he has been and was discriminated against every day he worked for that Pullman Company from 1951 until November 17, 1968, when he resigned.

The Court: Well, there has to be a starting point for these statutory periods to commence to run or it would make so sense. Certainly, in a sense his complaint was a continuing one, but he has to start some place and he did start. You said he started in '63 with the Colorado Commission and he went back in '65 to the Colorado Commission and you said he complained to the EEOC, so some

place he had to take a stand and say this, because this 210 days or this 30 day period must mean something.

Mr. McClearn: Your Honor, I don't know exactly the sequence of events and they haven't been fully explored here. Mr. Love signed a written complaint before the EEOC on January 23, 1966, or excuse me, July 23, excuse me.

The Court: Yes.

Mr. McClearn: Prior to that date, he had obviously contacted the EEOC, because they contacted Mr. Reynolds and on June 30 I think is the date and I may be off a day or so, Mr. Reynolds advised them that he did not want to entertain any further complaint and our position is that Mr. Love's complaint is just as current on that day and on the day he filed his complaint with the EEOC as it was on any other prior time.

I think the date in 1965 when he—there is a letter in the file from Mr. Reynolds—has no meaning with respect to cutting off his complaint. This isn't a case where he was transferred and his claiming that he was improperly transferred because——

The Court: What you are saying is as long as this man worked he didn't have to pay any attention to the time sequences or time requirements that the statute sets out? This is what I get out of your argument.

Mr. McClearn: No, my argument would be this and I don't know, we haven't come to the question of how much in the way of back wages he might be entitled to receive, but our position is that the discrimination which he alleges was being perpetrated against him, occurred, on every day and he had the right to make a complaint on any given day, and he consistently tried to do it for some five years and was able to trigger administrative action only when he finally filed his complaint with the EEOC on July 23, 1966.

I don't know how much in the way of assuming that he successfully establishes the liability here, I don't know what his damages might be, but I think that the nature of his claim is such that he could assert it and certainly tried to assert it on numerous occasions, but he could assert it any time, any time he could get someone to listen to him. The time limits here I just don't think make sense. As I say,

he kept trying to assert this claim, got no action to his way of thinking, and I think he has that right.

In other words, without getting into the merits of whatever the state agency did, he was not satisfied with it. He wanted to pursue it further. He did pursue it further, and in 1966 he finally pursued it to the EEOC. They entertained that complaint. Whether or not they properly entertained that complaint is a matter that I don't think is of concern to this Court. That may be something that——

The Court: It is, to the extent that jurisdiction was predicated on the law which puts cut off dates in it.

Mr. McClearn: Well, our feeling certainly is that the statute requires the plaintiff in this case to proceed through the EEOC, but I think it is manifestly clear to the Court that you have no way of overseeing the initiation of the complaint by the plaintiff at the EEOC. The matter doesn't get to this Court until they have exhausted their proceedings and I urge the Court's careful consideration of the Seventh Circuit case because I think that there is great similarity between the oath requirement in that case and the filing requirement here. The defendant is claiming that we didn't file the right papers in the state agency, and I maintain and I think that the——

The Court: You don't need to argue that. I am satisfied that that particular portion of your jurisdictional basis has been substantially complied with. As far as the state agency is concerned. But I am not satisfied as to the 30 day or 210 day period after the state closed its case or that's the claim of the defendant, it was closed, or after the July 30, 1965 date. That's the point that really concerns me.

Mr. McClearn: Let me then again, Your Honor, urge that you consider the type of claim that this gentleman is making because I think that——

The Court: Well, the statute doesn't distinguish it.

Mr. McClearn: I appreciate that, but it is sort of in the nature of a continuing argument, and as Your Honor is well aware, there are two schools of thought on where you run the statute of limitations on a continuing open account, but I think here we are not talking about an instance. The cases that we have cited to you and I think—well, let me go back to that a little bit. The Quarles case, which I cite

to you in my memorandum, is a case which I think might be analogous in the sense that there you had two hiring practices, one for negroes and one for whites, in a cigarette factory in South Carolina, which had resulted over a long period of years in an imbalance—not an imbalance, but a discriminatory effect in the level of the employees.

Well, now, this discrimination had gone on for years. There was nothing there that you could point your finger to and this is our case here. The effect that we complain about is an historical effect. The conductors had a no negro clause in their constitution and by-laws until just recent years. Negroes were not permitted to be in white unions in railroads. That's why Mr. Love was a porter. That's why porters had their own union. We are talking about 30 years of railroad history here which has resulted in, in effect, white conductors and black porters doing the same work, and that's what we complain about. We say that that history has resulted in an improper effect on Mr. Love and that that effect continues every day or continued every day that he worked for the Pullman Company, and, therefore, his complaint was for the discrimination that was occurring to him on a daily basis.

I don't think that it is fair to consider that his time to complain ran from the date when he finally talked to someone. Here he talked to people on at least three separate occasions, not talking about any intervening conversations that he might have had in an attempt to pursue his matter, but he talked in '63, he talked in '65, he talked again in '66. It wasn't until '66 that he was able to actually get someone to pay any attention to him in the sense that he wanted attention paid to him. When the EEOC accepted his complaint on July 23, 1966, and I think that if you will review that complaint, on its face it says it is a continuing discrimination. When did this discrimination take place? January, 1966, and continuing.

The Court: Well, I understand that it is continuing, but that doesn't mean to me that the time prescribed in the statute does not have to be complied with. It would be meaningless to—because most discrimination is continuing. I mean on a racial discrimination. It is continuing, we are learning, and I think truthfully that it has continued for over 200 years in America, so that's a fact we are not

concerned with here. We are concerned with whether or not the complaint that this man made was made at the times and to the agents that the law prescribed, and it must start sometime. There must be sometime when he has to move from the state board to the Federal board of the EEOC, and that's what Congress wrote into the 2000(e)(5), I believe it is.

Mr. McClearn: Well, then, our argument must be and we certainly do urge that the Court consider that our complaint was formally rejected by the Colorado Civil Rights Commission on—I just don't have that letter right before me. Is it June 1?

Mr. Eppich: Yes.

Mr. McClearn: June 1, 1966, when Mr. Reynolds wrote to the EEOC and told them to proceed and that they were deferring to the EEOC.

Thereafter, and it is not clear and I can only hypothesize here, but the formal decision rendered by the EEOC indicates that Mr. Love's complaint was May 23 or thereabouts, filed on May 23. Well, I can only suppose that's when Mr. Love first approached the EEOC. They thereafter contacted Mr. Reynolds, who on June 1 rejected their attempt to refer it back to him and then he actually signed his formal complaint on July 23 as is indicated on I think Mr. Love's affidavit.

Thank you.

The Court: All right.

Mr. McClearn: I don't quite understand the Court's reference to my basic claim, the colloquy between opposing counsel and you with respect to not having jurisdiction over Mr. Love's claim for money damages if you did not have jurisdiction over the main claim. I don't quite understand your reference and therefore I am at a little of a loss if I should make a comment or not.

The Court: Well, counsel, Mr. Eppich, stated something to the effect that if the claim is as he makes it here, why, there may be some back wages due, and I was just trying to find out from him. He said they were demittimus, I believe was his term. I was trying to find out from him if it was his position that this were a separate claim that wasn't governed by the same statutory provision as the other portion of the claim is concerned. That is the other refer-

ence. You seek injunction. That's one of the things that you seek here and certainly injunction and wages are different. Injunctive relief and monetary relief are two different things. I was just trying to get it clear, that's all. You are welcome to discuss it.

Mr. McClearn: No, this matter is before you under the 1964 Civil Rights Act for what remedies are appropriate.

The Court: Well, first, gentlemen, as I indicated to you, we had studied your briefs and, of course, the disposition——

Mr. McClearn: Excuse me, Your Honor, would it be helpful to have Mr. Love testify with respect to how he proceeded with his claim to the EEOC here, the one that culminated in the signed claim, because I would certainly want Your Honor to be fully apprised with the facts with respect to that if it is your intent to rule.

The Court: Well, it is my intent to rule, but I don't know how this can help, unless we set it down for an evidentiary hearing, because there may be some other evidence from the other side, too, you see. I have no—there is no doubt in my mind, but what there were some informal either conversations or maybe correspondence, I don't know, between Mr. Love and the EEOC, because as you pointed out, it is obvious they knew about it, because they contacted Reynolds, and he said, that, "You go ahead, we are not going to have anything more to do with it," or something to this effect, so there is no question in my mind that he contacted them. The question is whether he complied with the law. The law says he shall file a complaint and so if you have some evidence that he filed a complaint before May 23, 1966, I would listen to it. I would be glad to have you furnish it.

Mr. McClearn: I think we don't have that, but if I——

(Counsel consulted with plaintiff.)

Mr. McClearn: We have nothing further, Your Honor.

The Court: All right. Well, first, as to the claim for injunctive relief, why, it is obvious now that inasmuch as the plaintiff has resigned his position and that fact is admitted that question is moot.

Now, as to the other points, the defendant raises the point that the plaintiff hasn't complied with the requirements of the statute; that is the Colorado law here.

There is evidence that he did file a written complaint with the Commission sometime in '63, and apparently the claim was not resolved, that the Commission was then contacted again in 1965 by Mr. Love and he restated his complaint to the Commission, but no written complaint was filed at that time.

However, Mr. Reynolds, the director and head of the Colorado Commission, did contact the Pullman Company and apparently they said they would promote Mr. Love to the position of a conductor, then he would probably be laid off because of the seniority rules in effect.

Then, on July 30 of '65, Reynolds wrote Mr. Love advising him of this.

Now, I think that although he didn't file another formal complaint in '65, I think that he, Mr. Love, did substantially comply with the filing of the complaint before the Colorado Commission, because Reynolds, who had had a written complaint, apparently reopened the matter, because he did then take the matter up with Pullman Company and although Mr. Love hasn't or didn't comply strictly with the literal wording of the statute, he did, however, make substantial compliance.

I think it is fair to say that the theory or the principle behind the statute here that we are concerned with, the Federal statute, is that if a state has an anti-discrimination law that a person aggrieved must exhaust his remedies through the state channel before he can come into the Federal Court, and this he did all right. I think he effectively exhausted his remedy before the State Commission.

For those reasons, I do not think his failure to file the second written complaint or the written complaint in 1965 ousts this court of jurisdiction on that ground.

Now, the charge before the EEOC or the complaint there was filed May 23 of '66.

Now, as I indicated in my colloquy with counsel for the plaintiff, it is the Court's feeling that there must be some starting time for the beginning of these cut-off periods, the 30 day period or the 210 day period, whichever is applicable, and it is my holding and conclusion that period, the 210 day period, started on July 31 of 1965, after the letter was sent to Mr. Love by Mr. Reynolds of the State Commission.

I think that this effectively terminated the state's action,

because according to the records that are before me, no further contact was made by Mr. Love to the State Commission, so from July 31, 1965 to May 23 of 1966 is more than 210 days, so I must conclude that the charge and complaint before the EEOC was not timely filed and that the EEOC, therefore, did not have jurisdiction to consider the claim, and, thus, in view of the fact that it was not timely filed and that body did not have jurisdiction, then this Court is without jurisdiction to hear the complaint, and treating the motion to dismiss as a motion for summary judgment, the Court finds in favor of the defendants against the plaintiff for the reasons I have given.

The Court: Do either counsel have anything further?

Mr. Eppich: No, on behalf of defendant.

Mr. McClearn: Nothing, Your Honor.

The Court: You will prepare an appropriate order?

Mr. Eppich: Yes, I will.

The Court: Court will be in recess.

(Whereupon, the proceedings were concluded.)

REPORTER'S CERTIFICATE

I, Donna G. Spencer, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter;

Further, that I thereafter reduced my shorthand notes to typewritten form, comprising the foregoing Official Transcript;

Further, that the foregoing Official Transcript is a full and accurate record of the proceedings in the foregoing matter at the time and place set forth.

Dated at Denver, Colorado, this 31st day of March, 1969.

/s/ Donna G. Spencer
DONNA G. SPENCER
Certified Shorthand Reporter

In the United States District Court
FOR THE District of Colorado

Civil Action No. C-899

[Filed Jan. 9, 1969, G. Walter Bowman, Clerk]

EARL A. LOVE,

Plaintiff,

vs.

THE PULLMAN COMPANY, an Illinois Corporation,

Defendant.

DEPOSITION OF
James F. Reynolds
(Taken by Defendant)
December 5, 1968

PURSUANT TO SUBPOENA and SUBPOENA DUCES TECUM, the deposition of JAMES F. REYNOLDS called for examination by the Defendant THE PULLMAN COMPANY, was taken at 1908 Mile High Center, Denver, Colorado, starting at 10:15 o'clock, A.M., on the fifth day of December, 1968, before GEORGE H. TENCICH, a Notary Public and Certified Shorthand Reporter in and for the State of Colorado;

The Plaintiff appears in person and by his attorney, HUGH J. McCLEARN, ESQ, 1310 Denver Club Building, Denver, Colorado;

The Defendant appears by its attorneys, NEFF, SWANSON, and MYER, by EDWARD C. EPPICH, ESQ, 1908 Mile High Center, Denver, Colorado;

WHEREUPON, the following proceedings were had:

[2] PROCEEDINGS

IT IS STIPULATED and agreed by counsel for the respective parties that even though counsel should not object or except to any questions asked upon this examination or answers given thereto, all objections as to relevancy, competency and materiality, except as to the form of the question, may be made at the time of trial should counsel for either party desire to make such objections at the time of trial, and that the deposition is taken pursuant to the Federal Rules of Civil Procedure.

* * *

JAMES E. REYNOLDS, called as a witness for cross-examination under the Rules by the Defendant, being first duly sworn according to law, was examined and testified on his oath as follows:

CROSS-EXAMINATION

By MR. EPPICH:

Q. I believe that Mr. Reynolds is here today due to a Subpoena Duces Tecum which was originally scheduled for November 14, until today, December 5, 1968, but due to illness such as the flu, this has been continued to this date by stipulation of the parties.

Would you state your name and address, please?

A. James F. Reynolds. 3333 South Wabash Court, Denver, Colorado.

[3] Q. Are you employed, sir?

A. I am.

Q. By whom are you employed, and what is your position?

A. The State of Colorado as Director of the Civil Rights Commission.

Q. How long have you held this position?

A. Since May 18, 1963.

Q. The Colorado Civil Rights Commission is a creature of statute. Is that correct?

A. Yes.

Q. More specifically is that C.R.S. 80-21-1?

A. I think that is the correct one.

Q. What are your duties as Civil Rights Director?

A. It is to carry out the policies promulgated by the Commissioners and to enforce, direct the enforcement of the three statutes under which the Commission operates.

Q. What are those three statutes, if you know, sir, either by popular name, or otherwise?

A. They are anti-discrimination laws against discrimination in places of public accommodation and against discrimination in employment, and against discrimination in housing.

Q. Are these three separate statutes, if you know?

A. Yes, they are.

[4] Q. Nevertheless you have jurisdiction under all three statutes?

A. Yes. That is correct.

Q. Have these statutes been in effect since you were appointed Civil Rights Commissioner?

A. They were all in effect when I was appointed, yes.

Q. Do you know, sir, how long they have been the law of the State of Colorado?

A. The Public Accommodations Law has been a law since 1895.

The Employment Law since 1957. The Housing Law since 1959.

Q. As I understand it, sir, your job is to see that the provisions of the laws are enforced, or at least enforced at the administrative level?

A. That is correct.

Q. Mr. Reynolds, what you are concerned with in this law is a job basis discrimination based upon race. Is that a correct statement, Mr. Reynolds?

A. Yes.

Q. Colorado has such a law, do they not?

A. Yes, that is correct.

Q. Again it is your job to see that that law is enforced?

[5] A. Yes.

Q. Calling your attention to Earl Love, the plaintiff in this action ——

Mr. McLearn: We might note that he is present?

Mr. Eppich: Certainly.

Mr. McLearn: He is present in the room. Mr. Reynolds can identify him.

Mr. Eppich: I will start over again.

You know Mr. Earl Love, the plaintiff in this action?

A. Yes, I do.

Q. Pursuant to the Subpoena, and also to our agreement, we have talked—that is, you and I have talked before about these records, is that correct?

A. Yes.

Q. Have you brought with you all your documents, files, and records pertaining to Mr. Love?

A. I don't think so. I am almost positive there are other records, but we have not found them up to this time.

Q. Have you looked for them sir?

A. I have. Yes.

Q. Where have you looked?

A. In our records in the basement of the State Services Building, and in the State Archives.

Q. Where else would the records be kept?

[6] A. They would be in one of those two places, or within the files in our office.

Q. Have you checked the files within your office?

A. Yes. There is a box missing of employment records from 1962-1963, and we propose to institute a more diligent hunt for that box this weekend.

Q. Would it be a fair statement to say then that you have been able to account for the records, except for the years 1962-1963?

A. Yes.

Q. That is, as it pertains to Mr. Love, is that correct——

A. Yes.

Q. May I please examine the records that you have been able to find as concerns Mr. Love, and his alleged discrimination by the Pullman Company?

A. Let me correct that. I am almost sure there is a record somewhere in our files, or a letter concerning Mr. Love to the EEOC that I have not found either. It was—it would have been dated in 1965 some time.

(Whereupon various documents were produced by the deponent for Mr. Eppich's inspection.)

A. I am a little embarrassed about this, but we changed office managers, and people file by subjection, and nobody can ever find anything filed by anybody else under that system.

[7] Q. Let's go off the record.

(Whereupon there was unrecorded discussion)

Q. Mr. Reynolds, when did you first become acquainted with Mr. Love?

A. The day I walked in the office, I think, to take over the job.

Q. Would that have been about May 18, 1963?

A. Yes.

Q. How did this meeting come about?

A. Mr. Love and two or three other gentlemen who were with him were brought in to see me by a man who was on the staff, whose name was Galoway Denny.

Q. Is Mr. Denny still on the staff?

A. No. He works for the Bureau of Apprenticeship and Training.

Q. Is that in Denver?

A. Yes.

Q. Is that a State, or Federal job?

A. Federal job.

Q. Proceed.

A. It appears that Mr. Love and the gentlemen with him were concerned about the problems of discrimination within the railroad as to the difference between being a Porter-In-Charge, and a Railroad Conductor, or a Pullman Conductor—I am not sure which it was—but any way after some discussion I instructed Mr. Denny to take a complaint [8] from Mr. Love and any of the others that wished to file one and we would proceed from there.

Q. This would have been in May, 1963?

A. May, 1963. Yes.

Q. Allright, sir.

This complaint would have been merely a statement by Mr. Love as to the facts concerning the discrimination?

A. That is correct.

Q. What happened then, if you know?

A. I really don't know what happened after that. I don't recall having had any further conversations personnally with Mr. Love.

Let me explain something here that might be helpful: Under the system that we were operating under, and of course, remember I was brand new on the job, Mr. Love came in the same day I did, and the Deputy Director, who was a Mr. Edward Torrones actually handled the complaint processing so that a complaint filed by Mr. Love would not necessarily have been returned to me.

It could have been, but I don't remember having anything else to do with it after that one conference with Mr. Love.

Mr. Denny and the two or three other gentlemen who were with him then——

[9] Q. Well, sir, excuse me. Would it be fair to say that your job as Director is to initially examine the complaint, then assign them to your assistants for handling?

A. No. I am saying to you that that was done by Mr. Torrones, and it is pretty much the same way we operate

today: That is, this is the function of the Deputy Director, and I review complaints after the investigation has been completed and make a finding of Probable Cause or No Probable Cause.

I am just saying that if I did that with Mr. Love's complaint, I don't remember it.

(WHEREUPON, Defendant's Deposition Exhibits 1, 2, and 3 were marked for identification)

Q. Mr. Reynolds, I will now hand you what is marked as Defendant's Deposition Exhibit Number One and ask you to examine that.

A. Yes.

Q. Have you now examined it, sir?

A. Yes.

Q. Is that a true and complete copy of the file that you have produced here pursuant to the Subpoena Duces Tecum?

A. Yes.

Q. Do you have any objections if we use that document instead of the original so that Mr. Reynolds can have his [10] file back?

Mr. McLearn: No.

Mr. Eppich: Mr. Reynolds, we have a letter dated July 30, 1965, addressed to Mr. Love.

Is that signed by you, sir?

A. Yes, it is.

Q. Was this letter written as a result of the investigation by the Colorado Civil Rights Commission, or Colorado Civil Rights Department?

A. No. Mr. Love returned to our office some time in 1965.

Q. He did?

A. Yes. He stated that he was not happy with the results produced by us previously, and I discussed it with the Commissioners and explained to them the ramifications of Mr. Love's complaint if pursued.

And the Commissioners after some discussion directed me to contact the Pullman officials and discuss the matter with them.

They declined at that time to carry Mr. Love's complaint to a Hearing.

As the result of that instruction from the Commissioners

I had a talk with Mr. Huffendick. In my discussions with Mr. Huffendick he literally admitted to the differences between a Porter-In-Charge and a Conductor and informed [11] me that the railroad would at that point change Mr. Love from a Porter-In-Charge to a Conductor, but, of course, stating that if they did, that they already had a lay-off list of Conductors that was rather extensive; and that upon change of category Mr. Love would go to the lay-off list.

Of course, Mr. Love was not interested in going to the lay-off list of a Conductor from a working Porter-In-Charge.

Q. The affect of that would be that he would have a title, but wouldn't have any pay.

A. No job.

Q. Let me back up a moment: In 1963 you conducted an investigation, and then evidently you concluded the investigation, is that correct?

A. Yes.

Q. You so advised Mr. Love, is that correct?

A. Yes.

Q. Then in 1965 it must have been prior to July 30 of 1965 that Mr. Love then came back to your office and in effect said "I am still not satisfied."

A. Yes.

Q. Do you have any idea when this would have been: Was that in May, June, or July of 1965?

A. I really don't remember.

Q. In any event it was prior to July 30th?

[12] A. Yes.

Q. Did you at this time take a written complaint from Mr. Love?

A. At that time we did not have a written complaint because the results of the first one had been unsatisfactory. That is—well, let me explain something else here: In pursuit of civil rights complaints as you may be aware, through the course of the years the philosophy and the outlook on discrimination has changed substantially. In 1963 as well as in 1965 our Commissioners took a straight forward legalistic kind of a look at discrimination; but beginning in 1966, and through the present, we have quite a different philosophy towards discrimination and the treatment of Mr.

Love's case today would be significantly different from what it was in 1963 because we have recognized, and adopted definitions of discrimination that are substantially different.

We recognize today for example the patterns of discrimination. We recognize today discriminatory agreements entered into between labor and management to the detriment of minority people, and this would apply to Mr. Love's case, and it was not a philosophical view that we held at that time.

And, of course, we also today accept cases of discrimination based upon differential treatment which implies discrimination without actually being what could be defined legally as discrimination. That is, the result that differential [13] treatment leads to an unfair something to the person receiving it, and these kind of views we didn't operate under in 1963.

Q. Would it be fair to say that the policies of the Colorado Civil Rights Commission has changed over the years?

A. Yes.

Q. Now, in going back to your letter of July 30, 1965, and I am also talking about the 1965 meeting that you had with Mr. Love, you literally went to bat for him, didn't you?

A. Yes. We attempted to.

Q. Well, you went down and talked to the Pullman Company, did you not?

A. Yes.

Q. That would be Mr. Huffendick whom you previously referred to?

A. Yes.

Q. The substance of that conference was that Mr. Huffendick said that Mr. Love could be promoted, if that is the right word, or at least his job classification changed from Porter-In-Charge, to Conductor?

A. Yes.

Q. But that if he did that, he would lose his seniority rights?

A. Yes.

[14] Q. Then he would go to the bottom of the list as a Conductor?

A. That is correct.

Q. Due to the fact that there were several Conductors who had been furloughed, which in railway parlance is laid

off, then Mr. Love would in effect have been unemployed?

A. That was Mr. Huffendick's position.

Q. You then presented your findings to the Civil Rights Commission of the State of Colorado?

A. Yes, and to Mr. Love.

Q. What were your findings. Now, I am referring to July of 1965.

A. As I said, Mr. Huffendick literally admitted to the fact that the practices as pertains——

Q. Excuse me, sir. Just what were your findings?

A. Well, now, let me reiterate what I said to you, that we did not take another complaint from Mr. Love in 1965. I don't remember what the findings were in 1963, but pursuant to what happened, I assumed we made a negative finding in 1965 because Mr. Love did return in 1965 stating that he was not happy and that he wished us to take further action.

Q. By "negative findings" do you mean that you found no discrimination in 1963?

A. I assume that we did, but I don't remember specifically what we did find in 1963.

[15] Q. Allright, sir.

Then in 1965 when you went to the Commission they advised you after you explained the facts as you knew them, that they again would take no action, is that correct?

A. Yes.

Q. Pursuant to that discussion with the Commissioners did you then issue your letter of July 30, 1965, which is page 1 of Defendant's Deposition Exhibit #1, and presented that to Mr. Love?

A. Yes.

Q. This then would be advising him that the Colorado Civil Rights Commission was going to take no further action?

A. Yes, unless he wanted to accept the conditions that Mr. Huffendick stated would happen if he were promoted, if you call that a promotion.

Q. Allright, sir. I am not clear on that.

A. Well, I am trying to say that Mr. Huffendick said "well, yes, the treatment—the practices we follow were caused by agreement between the union and the company, but we are not happy today with it, and we will correct it,

if Mr. Love so desires; but if we correct it, and we promote him to a Conductor, the lay-off list is extensive and we will name him a Conductor and he will go to the bottom of the seniority list of Conductors, rather than the top of the list as a Porter-In-Charge, or a Porter, and at that point he [16] will be without a job."

Q. Allright, sir.

A. And I so informed Mr. Love of this conference.

Q. Then would it be fair to say as a result of your work around July of 1965 that you were able to get Mr. Love the job of Conductor, but he would have pay problems if he took it: And you so advised Mr. Love and said in effect that "This is all the Civil Rights Commission of the State of Colorado can do, or will do"?

A. Well, yes. No. No. I didn't say that was all we would do but I said we would proceed and take whatever action was necessary to have him made a Conductor.

Q. That is, if this is what he wanted?

A. Yes. If that is what he wanted.

Q. What, if anything, did he advise you in this connection?

A. I think the next I heard from Mr. Love was indirectly being called upon by a representative of the EEOC from Dallas, Texas. I don't remember that Mr. Love responded to me—to my letter directly but——

Q. Do you know when it was that you heard from the Dallas office of the EEOC?

A. It was some time after I wrote Mr. Love. It was the summer of 1965, but I don't remember the date.

[17] Q. Was this an oral, or written contact by the EEOC?

A. It was a visit in my office.

Q. Did you make any sort of notation of it, or any memorandum of it?

A. No. Not of the visit.

Q. Through Mr. McLearn I will not hand you Defendant's Deposition Exhibit #2: I will ask you to examine that.

A. Yes.

Q. Mr. McLearn, is it agreed that Defendant's Deposition Exhibit #2 is a Complaint filed with the EEOC and in which we are concerned with in this civil action in the federal court?

Mr. McLearn: To the best of my knowledge, it is.

Mr. Eppich: I note on this Defendant's Deposition Exhibit #2, Mr. Reynolds, the date is—well, it is dated in July of 1966. Is that correct?

A. Yes. July 23, 1966, I think.

Q. Could this contact you had with the representative from the EEOC have been in the summer of 1966 then, instead of the summer of 1965?

A. Of course, it could have been, but I am almost pretty darn sure that it was in 1965.

Q. So that it is your best recollection that Mr. Love [18] after receiving your letter within two or three months after that time contacted the EEOC, who in turn contacted you?

A. That is the impression I received, yes.

Q. The statement on here, and I am now quoting you paragraph 4 "I have been performing the duties as an "In-Charge" Porter which has duties and responsibilities of a Pullman Conductor, and yet I receive lower wages. I believe that I am being discriminated against because of my race."

That is substantially the same charge that he was making to you, is it not?

A. Yes.

Q. In fact it was the same charge. Is that correct?

A. Pretty much so.

Q. Now, it is the policy, is it not of the EEOC to recognize Colorado as being one of the states which has an anti-discrimination law that satisfies the provisions of Title VII?

A. That is correct.

Q. Now, Mr. Reynolds, I will hand you Defendant's Deposition Exhibit #3 and ask you if that pamphlet is not available in the offices of the Colorado Civil Rights Commission?

A. Yes. I am sure it is.

Q. It is published by United States Government, is it not?

[19] A. Yes.

Q. This particular pamphlet came out in 1965, I believe, did it not?

A. Yes.

Q. Did you do any further investigative work in connec-

tion with Mr. Love's Complaint subsequent to July 30, 1965?

A. No.

Q. Were you requested by the EEOC to conduct such investigation?

A. No.

Q. As far as you are concerned the matter was closed in July, 1965?

A. Yes.

Q. That is, unless Mr. Love wanted his job as Conductor?

A. He never contacted me, so I assume that he didn't.

Q. Mr. Reynolds, we are under somewhat of a time requirement in the Federal Court. I would like to ask you if you could immediately conduct another search for any other records such as correspondence, or any documents of any nature pertaining to Mr. Love's complaint against the Pullman Company that have been filed with your office?

A. I certainly will.

[20] Q. Can you give us an idea how long this will take for you to satisfy yourself there are no more records?

A. As I said, I do plan to have several people fine tooth comb the storeroom this weekend, and whatever we have, we will find it.

Q. Can you advise us by Monday, sir?

A. Yes, I will.

Q. Would that be satisfactory to you, Mr. McLearn?

Mr. McLearn: Surely.

In other words, Jim, if you will drop us a note and let us know if you had any luck in finding any othe documents, that will be helpful.

A. Allright.

Mr. Eppich: We will now ask that the first page of Defendant's Deposition Exhibit #1, and Defendant's Deposition Exhibits #2 and 3 be offered at this time for the purposes of this deposition.

Mr. McLearn: Fine.

Mr. Eppich: You may inquire.

By Mr. McLearn:

Q. Mr. Reynolds, tell us if you know the effective date of the 1964 Civil Rights Act?

A. The effective date of it was July 1, 1965.

Q. This is the Act that created the Equal Employment
[21] Opportunities Commission, is that correct?

A. Yes. That is correct.

Q. What was the nature of the contact that you had with a representative of the Dallas office of the EEOC in connection with Mr. Love?

A. Let me back up and say here for whatever it is worth that prior to the effective date of the 1964 Civil Rights Act, our Commission had been in extensive contact with Mrs. Hernandez, and Mr. Roosevelt, and some other members of the staff of the EEOC, and had made suggestions as to the methods of their operation and other things of this sort, so that upon their forming this, we discussed with them regional offices and we even tried to get a regional office here in Denver.

So, when they came into being officially in 1965, we had had extensive contact with them. So, that when the man came to our office from the office in Dallas, most of our conferences had to do with their plans and what they were going to do, and how they were going to do it.

Incidentally, we sort of talked about Mr. Love.

Q. Is there any doubt in your mind as to the time of this conversation being after the letter of July in 1965?

A. I am sure it was after that, but how long after, I don't know.

Q. What was the nature of your discussion?

Who was this gentleman, by the way?

[22] A. I don't remember his name.

Q. You remember the substance of your conversation with him concerning Mr. Love?

A. I think essentially he asked me what we had done about it and if we planned to pursue it any further. As far as I remember that was the nature of our conversation.

Q. What did you tell him?

A. I told him the conclusions we had reached, and what I had written Mr. Love and that I had not heard from Mr. Love, and assumed that he was not interested in becoming a Conductor with no job.

Q. Did you have any subsequent contact with the EEOC?

Was there any further discussion by the way at this time?

A. Pertaining to Mr. Love, do you mean?

Q. Yes.

A. Nothing that I remember.

Q. Do you recall any subsequent contact subsequent to this discussion with this gentleman from the EEOC about Mr. Love?

A. I feel sure, and I felt sure, although I haven't found it, that he asked me for a letter stating that we did not intend to proceed further with Mr. Love's complaint. And I would have sworn that I wrote such a letter, but I haven't [23] found it.

Q. Did you have any subsequent contact from the time you wrote the letter——

A. No. I am sure—well, let me say this: That during or shortly after that period of time Mr. Roosevelt, of course, was yachting when the budget came up for the EEOC, and was sort of ousted, and there were some changes being made and when I say "we", our Commission got into the act of lobbying for a new chairman and a regional office somewhere in the west other than the Dallas office, and in the course of that, of course, I met Mr. Menies, and Mr. Robles, and finally an office was established in Albuquerque, and an outlying office here in Denver, and a man from our staff, Jim Warren became an EEOC representative in Denver for a year, or a year and a half.

So, that we—you asked me if I had any more contact with the EEOC. Yes. A lot of it, but none that I remember concerning Mr. Love.

Q. I don't have any further questions.

RECROSS-EXAMINATION

By MR. EPPICH:

Q. Correct me if I am in error here: The conversation that you had with the representative from the EEOC concerning Mr. Love was that in conjunction with over-all policies of the EEOC. Is that correct?

[24] A. Yes.

Q. The primary thing they were here for was setting up the EEOC?

A. I sort of got that impression that it was a familiarization of the region that was under the Dallas office.

Q. It is your recollection that this would have been in the late summer then of 1965?

A. To the best of my recollection it was.

Q. The conversation with Mr. Love came up as a shop-talk type thing, is that correct?

A. Sort of, yes.

Q. At that time they asked you to send a letter to them stating that you had not any intentions to take it further?

A. As I remember, yes.

Q. At that time you told them you didn't intend to take it any further?

A. That is correct.

Q. To date you have been unable to find any written complaint with the Colorado Civil Rights Commission pertaining to Mr. Love?

A. So far I have not.

Q. That is all I have.

FURTHER DEPONENT SAITH NOT

James F. Reynolds

[25] Subscribed and sworn to before me this —— day of ————, 196—.

My Commission expires April 3, 1972.

Notary Public
George H. Tencich

Cost to Defendants ——

DEPOSITIONS, INC.
CERTIFIED SHORTHAND REPORTERS
412 MAJESTIC BUILDING
DENVER, COLORADO
825-9109

December 9, 1968

James F. Reynolds
3333 South Wabash Court
Denver, Colorado

RE: Love vs. Pullman Company C-899

Dear Mr. Reynolds:

Your deposition taken in the above entitled case has now been transcribed and is ready for your signature.

It will be necessary for you to come to our offices, 412 Majestic Building, Denver, Colorado, within the next twenty days. For the purposes of reading and signing depositions, our offices are open Monday through Friday (holidays excluded) between the hours of 9:00 a.m. to 4:00 p.m.

The Court Rules require that we file your deposition "promptly." Therefore, if we have not heard from you within the next twenty days, we shall file your deposition with the Court without your signature.

Yours truly,

/s/ George H. Tencich
DEPOSITIONS, INC.

BY: _____

CC: Hugh J. McLearn, 1310 DC Bldg.
CC: Edward C. Eppich, 1908 Mile High Center
CC:
CC: Attached to original of
deposition for the Court

CERTIFICATE

STATE OF COLORADO
CITY & COUNTY OF DENVER } ss.

I, George H. Tencich, Certified Shorthand Reporter and Notary Public of the State of Colorado, duly appointed to take the deposition of the said JAMES F. REYNOLDS, do hereby certify that previous to the commencement of the examination of the said JAMES F. REYNOLDS, he was first by me duly sworn to testify the truth, the whole truth and nothing but the truth touching and concerning the matters in controversy between the parties hereto, so far as he should be interrogated concerning the same;

That said deposition was stenographically reported by me at the time and place heretofore set forth, and was reduced to typewritten form under my supervision, as per the foregoing;

That the foregoing is a true and correct transcript of my shorthand notes then and there taken;

That after the deposition was transcribed, the same was submitted by letter to the deponent for reading and signing, a copy of which is attached to the deposition of James F. Reynolds; (That to date of filing there has been no response by the deponent, and said deposition remains unsigned, and the same is filed herewith pursuant to the provisions of Rule 30-e);

That I am not of kin or in anywise associated with any of the parties to said cause of action, or their counsel, and that I am not interested in the event thereof;

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 9th day of December, 1968. My Commission expires April 3, 1972.

/s/ George H. Tencich
Notary Public
George H. Tencich

Cost to Defendants $67.75.

State of Colorado
Civil Rights Commission

July 30, 1965

Mr. Earl A. Love
Porter-in-Charge
Pullman Company
1511 East 29th Avenue
Denver, Colorado

Dear Mr. Love:

The discussion we held with the Pullman officials led to the following: seniority is lost if a person changes categories. If an "In-charge" Porter became a Pullman Conductor, he would become the lowest ranked conductor and would be subjected to lay off immediately, based on his new status.

It was my understanding that none of your people would be interested in a pay cut. If there are those who would not object, I will be happy to pursue the case to an end.
Sincerely,

/s/ James F. Reynolds
James F. Reynolds
Director

JFR:blg

Defendants Deposition Exhibit One (1) 12-8-68

8 pages

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20506

EARL A. LOVE
Charging Party

vs.

THE PULLMAN COMPANY
Denver, Colorado
Respondent

Case No. 6-5-5042

Date of alleged violation: Continuing
Date of filing: May 23, 1966
Date of service of charge: September 23, 1966

DECISION

Summary of Charge

Charging Party alleges discrimination based upon his race (Negro) as follows: He performs the same duties as "porter-in-charge" as are performed by conductors who are white. He does not receive the same rate of pay as conductors.

Summary of Investigation

The Respondent is a division of The Pullman Company, Chicago, Illinois. It is engaged in the maintenance and servicing of railroad sleeping cars. It has more than 100 employees and is engaged in interstate commerce. In its Denver office, it employs 48 persons, 23 of whom are Negro. All Negroes are employed as porters and all porters are Negro.

The Charging Party has been employed by the Respondent for more than 40 years, the last 20 of which he has been employed as a porter-in-charge. The Charging Party complains of the classification and wage schedule of Respondent that pays him less money for doing essentially the same work as conductors.

Porters are an all-Negro classification, and conductors are all white. Promotions for Negroes are limited to the

position of porter-in-charge, also an all-Negro classification. White persons are traditionally hired as conductors. Porters are represented by the Brotherhood of Sleeping Car Porters and have a labor management agreement with Respondent. The conductors are represented by the Brotherhood of Railroad Trainmen. Neither union is a named party to this proceeding.

The investigation established that the duties of the porter-in-charge and the conductor are essentially the same. According to the Respondent, both do the following acts:

1. collects tickets
2. collects cash
3. diagram work
4. equipment inspections
5. passenger contact

In addition to the above duties, as one might expect, the white conductor supervises the porters and attendants (Negro), prepares a ticket report, and supervises three or more cars. Porters-in-charge supervise one or two cars.

Thus, Respondent urges that it is complying with the collective bargaining agreement in classifying the jobs separately and in determining the rate of pay. Respondent acknowledges that the classifications are racial and knows that it has continued to maintain the racial classifications subsequent to the effective date of Title VII of the Civil Rights Act of 1964, to wit, July 2, 1965. Although the maintenance of discriminatory job classifications, and pay scales based thereon, were permissible prior to the effective date of Title VII, Respondent furnishes no basis, nor are we aware of any, that would condone such practices now. The Commission previously held that job classifications in the railroad industry whether segregated on the basis of race or sex are in violation of Section 703 (a) (1) and (2) of Title VII. And in cases such as this where a different rate of pay for doing essentially the same work exists with the only additional duties being those denied to Negroes to disqualify them from the higher classification, it is a discriminatory device prohibited by Title VII.[1]

The dilemma facing Charging Party is clear from the

[1] Case Nos. 5-10-1521 and 5-10-1778 thru 5-10-1781. I certify that this is a true copy of the Decision in Case No. 6-5-5042.

investigation. He is a Negro. He is a porter-in-charge performing essentially the same duties as a conductor. He cannot be promoted to conductor, an all-white classification despite the job relatedness of the two positions. It becomes obvious that the real difference in the jobs and the rates of pay is race.

Decision

Reasonable cause exists to believe that the Charging Party was discriminated against by the Respondent in violation of Title VII of the Civil Rights Act of 1964, as alleged.

For the Commission:
/s/ Marie D. Wilson
MARIE D. WILSON
Secretary

Jan. 24, 1968
Date

TO: Director of Compliance

FROM: Joe L. Black, Austin

RE: Earl A. Love
1511 E. 29th Avenue
Denver, Colorado 80205

Case No. 6-5-5042

vs.

The Pullman Company
23rd & Fox Street
Denver, Colorado 80216

FINAL INVESTIGATION REPORT

I. *The Charge*

Earl A. Love, Charging Party, alleges discrimination on the basis of Race (Negro) as follows: that he performs duties as a porter-in-charge which are duties and responsibilities of a pullman conductor, and yet, he receives lower wages than a pullman conductor.

II. *Chronology of Events*

Charging Party stated that 40 years ago he was employed by The Pullman Company as a sleeping-car porter, and that he has been porter-in-charge for the past 20 years. He claims that when he is on duty as a porter-in-charge, he has the duties and responsibilities of a pullman conductor, but he receives porter's pay. He stated that he was not interested in a conductor's position, but that if he performs the duties of a conductor, then he believes he should get paid for it. He said that he believes the union contract (TAB F) is discriminatory inasmuch as it limits his advancement and prohibits him from getting higher wages. Thus, he filed a complaint with the Equal Employment Opportunity Commission on May 23, 1966.

III. *Background*

The Pullman Company in Denver, Colorado, is a division of the Pullman Company, an Illinois Corporation with Headquarters in the Butler Building in Chicago, Illinois. It is not a Plans for Progress Firm. Jurisdiction of EEOC derives from employment of approximately 300 employees

in both Denver and Illinois. TAB I. This firm engages in interstate commerce.

The Pullman Company's main activity is servicing sleeping cars.

The city of Denver is a rapidly-growing center for business and commerce with widely diversified industry. The 1960 U. S. Census Report shows an estimated population of 493,887—30,251 are Negro and 41,590 are Mexican-American.

A tour of the facilities revealed no evidence of discrimination in the use of rest-rooms, water fountains, etc. An EEOC poster was in evidence in the personnel office.

Respondent's employees are affiliated with the Brotherhood of Sleeping Car Porters Union. TAB F.

IV. *The Facts*

Interview with Charging Party at 1511 E. 29th Avenue, Denver, Colorado, on July 23, 1966. Charging Party stated that he first went to see Mr. James Reynolds, Director of the Civil Rights Commission of Colorado, but believed that Mr. Reynolds was not much interested in his case. TAB G. He said that Mr. Reynolds thought that he (Charging Party) wanted a promotion to the position of conductor, however, this was not the case. He stated that his concern was getting conductor's pay since he had conductor's duties and responsibilities.

Mr. Reynolds told Investigator that he personally investigated Charging Party's charge and talked with Mr. Huffendick, Superintendent of The Pullman Company, concerning the disposition of charge. He said that from this investigation he noted that porters and conductors are in separate lines of progression—Negroes perform as porters and only Whites perform as conductors. Mr. Reynolds stated that Mr. Huffendick explained that this was due to the Union's Collective Bargaining Agreement. Mr. Reynolds stated that he wanted to pursue the investigation to an end but hadn't heard anything further from Charging Party. TAB G.

Charging Party stated that Whites are hired from the streets as conductors, yet, Negroes are never given the opportunity to progress or advance to this position. Investigator asked both Charging Party and Management to explain the duties of porter-in-charge and conductor. Es-

sentially, the answers were the same. It was explained that a conductor's duties consisted of:

a. supervising employees such as porters and attendants
b. collecting tickets
c. reporting tickets
d. cash and diagram work
e. duties relating to equipment inspections
f. passengers contact
f. handles three (3) or more cars

The porter-in-charge duties consist of:

a. prepares sleeping accommodations
b. sets up a car, generally for service
c. collects tickets
d. collects cash
e. diagram work
f. notes defects in equipment
g. passenger contact
h. handles only one (1) pullman car

Charging Party stated that since he performs the duties of a conductor too, he should be given conductor's pay; however, Charging Party is in charge of only one pullman car. The Union Agreement specifically provides that:

> "Rates of pay for 'in-charge' porter's service . . . an employee assigned to run 'in-charge' of two (2) or more cars shall be paid the conductor's minimum rate for time actually in such service."

Since Charging Party is in charge of only one pullman car, the agreement prohibits his receiving conductor's pay. This was corroborated by Respondent.

Interview with H. T. Huffendick, District Superintendent, on July 27, 1966. Mr. Huffendick received the charge. TAB B. He also received the Receipt for Service but refused to sign it. He refused to make records accessible to Investigator saying that he had to get clearance from the main office in Chicago. Investigator informed him that another contact would be made in the hope that he had obtained clearance. (Investigator was called back to the Regional Office and did not return to Denver until September 1966.) On September 23, 1966, Investigator contacted Mr. Huffendick who signed the Receipt for Service (TAB C) and the

EEOC-1 (TAB I). Mr. Huffendick orally denied the charge and prepared a written statement. TAB E. He essentially based his denial of the charge on the ground that the Union's Collective Bargaining Agreement was controlling insofar as Charging Party receiving conductor's wages since Charging Party is in charge of only one pullman car at a time, whereas, a conductor may supervise ten or more pullman cars. TAB E.

Investigator asked Mr. Huffendick whether Negroes were given the same opportunity to advance to the position of conductor as others. He stated that to his knowledge, no Negro had held this position.

V. *Investigative Conclusions—Alleged Violations*

Investigation disclosed that Respondent is not violating Section 703(a)1 of Title VII of the Civil Rights Act of 1964 as far as wage discrimination is concerned.

It is concluded by Investigator that porters-in-charge do not have the same responsibilities as pullman conductors.

Investigative Conclusions—Non-Alleged Violations

Investigation disclosed that the Sleeping Car Porters Union and Respondent are in violation of Title VII of the Civil Rights Act of 1964 by the following act:

> Respondent and Union have entered into a collective agreement which limits advancement of Negroes from a porter's position to a conductor's position and only whites are employed as conductors, while Negroes are employed as porters and as "in-charge" porters.

VI. *Recommendation to the Commission*

It is recommended that the Commission find no probable cause to believe that the charge is true.

It is further recommended that the Commission consider the issuance of a Commissioner's charge against the Pullman Company and the Brotherhood of Sleeping Car Porters Union.

I CONCUR WITH THE ABOVE RECOMMENDATIONS.

/s/ L. G. W.
LEE G. WILLIAMS,
Regional Director

United States Court of Appeals
Tenth Circuit

[Filed, Sep. 22, 1969, William L. Whittaker, Clerk]

EARL A. LOVE, *Plaintiff-Appellant,* v. THE PULLMAN COMPANY, an Illinois corporation, *Defendant-Appellee.*	No. 209-69.
THE PULLMAN COMPANY, an Illinois Corporation, *Defendant-Cross Appellant,* v. EARL A. LOVE, *Plaintiff-Cross Appellee.*	No. 226-69.

HUGH J. MCCLEARN, Denver, Colorado (Frederick Miles, and Van Cise, Freeman, Tooley & McClearn, Denver, Colorado, with him on the Briefs), for Appellant and Cross-Appellee.

EDWARD C. EPPICH, Denver, Colorado (Neef, Swanson, and Myer, Denver, Colorado, with him on the Brief), for Appellee and Cross-Appellant, The Pullman Company.

MARIAN HALLEY, Attorney, Washington, D. C. (Daniel Steiner, General Counsel, and Russell Specter, Assistant General Counsel, with her on the Brief), for United States Equal Employment Opportunity Commission, as Amicus Curiae.

Before FAHY, Senior Circuit Judge *, LEWIS and SETH, Circuit Judges.

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* Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

SETH, Circuit Judge.

Appellant brought suit pursuant to 42 U.S.C.A. § 2000e-5(f), a portion of Title VII of the Civil Rights Act of 1964, alleging that he was discriminated against in employment because he was a Negro. The appellee moved to dismiss the complaint on the ground that the charge was not timely filed with the Equal Employment Opportunity Commission and that appellant's cause of action was moot. The trial court treated appellee's motion as a motion for summary judgment, and granted it. This appeal was then taken. The Equal Employment Opportunity Commission has filed a brief as amicus curiae.

Appellant was employed by the appellee for more than forty years as a Pullman porter. He resigned from this position in November 1968. In 1951 the appellant was classified and began to perform the duties of a "porter in charge." Appellant states that the duties of a porter in charge are for all purposes identical to those of a Pullman conductor, and that porters in charge must at all times be available to work as such a conductor. Porters in charge however receive substantially lower wages than do conductors.

In his suit, appellant asserts that he has been restricted to the classification of porter in charge because of his race and that the classification of conductor is primarily an all white classification from which Negroes were excluded.

The trial court found that in 1963 the appellant filed a written charge of discrimination with the Colorado Civil Rights Commission and that in 1965 he orally restated his complaint to that same commission. The court found also that this oral statement did not literally comply with the Colorado statute governing the same, but it was substantial compliance. The court found that the appellant's case was thereby reopened in 1965, but the commission was unable to reach an arrangement with The Pullman Company that was satisfactory to the appellant. The company advised the commission they would promote the appellant to conductor, but by reason of the union contracts he would be very low in seniority as a conductor and that he would probably be laid off. The commission so advised the appellant by letter. This was found by the trial court to have

terminated the proceedings on appellant's complaint in July 1965.

Thereafter, on May 23, 1966, appellant sent a letter complaint to the Equal Employment Opportunity Commission (EEOC) in Washington making the same complaint that he had to the Colorado commission. When the EEOC received appellant's letter it, in some way undisclosed in the record, informed the Colorado commission that it had received a charge of discrimination which appeared to be within the jurisdiction of the Colorado commission. By letter of June 1, 1966, the Colorado commission advised the EEOC that in light of its prior contacts with the appellant and his failure to return to file a complaint, the commission would not "accept" the sixty day deferment period, waived it, and asked the EEOC to proceed.

The EEOC then served a copy of the charge on the appellee and began an investigation. A charge on an EEOC form signed by appellant dated July 23, 1966, also appears in the record, and we assume this supplemented his original letter of May 23, 1966.

A "Final Investigative Report" by a Regional Director of the EEOC found no violation of Title VII. He instead found that the Sleeping Car Porters Union and The Pullman Company were in violation of the Act by reason of their union contract. He recommended that a commissioner's charge be brought on this basis. The commission thereafter found otherwise and issued its Decision that there was instead reasonable cause to believe that there was discrimination. On May 3, 1968, the EEOC notified the appellant that it had been unable to secure the appellee's voluntary compliance with Title VII and that the appellant had thirty days in which to bring suit.

The appellant then duly filed a complaint and later an amended complaint on behalf of himself and of all persons similarly situated who had suffered from the appellee's alleged discriminatory employment practice. The appellant also prayed that appellee be enjoined from classifying its employees on the basis of race and sought back pay for himself and for the class of persons situated as himself in the amount of the difference between the wages they had earned and what they would have earned but for appellee's discrimination.

The trial court in granting summary judgment in favor of the appellee ruled that since the Colorado Civil Rights Commission had terminated its proceedings on appellant's complaint on July 30, 1965, and inasmuch as appellant did not file his charge with the EEOC until May 23, 1966, or more than thirty days after termination, appellant had failed to comply with section 706(d) [42 U.S.C.A. § 2000e-5 (d)].

The trial court also ruled that since the appellant had resigned from employment with the appellee in November 1968, his request for injunctive relief was moot.

We must affirm the trial court on the timeliness of filing issue, and to thereby give effect to the time limits expressed in the statute.

It is clear that the Colorado Civil Rights Commission acts under a Colorado statute prohibiting the employment practice alleged and establishing state authority to grant or seek relief all as contemplated in section 706(d) of the 1964 Civil Rights Act [42 U.S.C.A. § 2000e-5]: Since the Colorado statute and the State commission so come within the terms of section 706(b) of the Act, no charge can be filed with the EEOC under section 706(a) until after the expiration of sixty days after proceedings are commenced in the State, unless the State proceedings terminate within such time. Further the Act in section 706(d) [42 U.S.C.A. § 2000e-5(d)] provides that filing with the EEOC must be made under these circumstances within two hundred ten days after the alleged unlawful employment practice occurred, "or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, ..."

The trial court found, and the record shows, that the Colorado commission terminated its proceedings on plaintiff's complaint on July 30, 1965, and so notified him. We also agree that this second period of consideration was an effective reopening of prior proceedings on the same complaint. Thus if appellant had filed his complaint with the EEOC within thirty days thereafter there would be no question as to its authority to act on such a complaint. Appellant did not do so but waited until some time later and mailed a letter of complaint to the EEOC.

The appellant, and the EEOC as amicus curiae, argue

here that this letter to the EEOC started a new chain of events, and they ignore the prior failure by appellant to comply with the time requirements. The EEOC, to sustain this position, urges that upon receipt of a complaint letter directly from an individual as the appellant here, it may hold it in some sort of suspense and "advise" the State commission concerned. Then at the end of the period the State has to consider complaints (sixty days) the commission can then automatically "assume jurisdiction," as if the complaint had been made directly to the State agency and, thereafter within the time limit, filed with the commission.

As indicated above, we must affirm the trial court in its holding that the time limit was ignored as to the complaint appellant himself filed with the Colorado commission. We also hold that the device used by the EEOC to start a new time sequence was ineffective to do so. Under the Act, when the appellant's letter to the EEOC was received it was thereby filed as the filing date cannot be manipulated by the commission. Its own regulations state ". . . a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." The charge was apparently definite enough for the EEOC to advise the Colorado commission although the record does not show how this was done. The EEOC in its brief also states: "It is established beyond question that a charge, originally in the form of a letter, may later be reduced to proper form, and that the later official charge will relate back to the date of the letter." Thus the charge here concerned was filed when received, and at that time the EEOC had no authority over the matter because it had then not yet been presented to the Colorado commission.

In International Bhd. of Elec. Workers v. United States Equal Employment Opportunity Comm'n, 398 F.2d 248, the Third Circuit held that a charge when filed with the EEOC before the expiration of the State's sixty day period was not then valid. The same situation here prevails because appellant's charge was filed with the EEOC before Colorado had a chance to act on it. The court in I.B.E.W. however found a subsequent charge filed within the statutory time

intervals and sequence was valid and within the two hundred ten day period.

The trial court in the case at bar also had no statutory power to hear the case because the EEOC also lacked such authority. The trial court so held. See Washington v. Aerojet-General Corp., 282 F.Supp. 517 (C.D.Calif.), where the date of receipt and the date of filing were also considered.

The Civil Rights Act of 1964 is precise in its requirements that the States with adequate statutes and machinery have the first opportunity to consider complaints. This first opportunity is a clear requirement in the sequences set out in the Act. This opportunity cannot come by an advice from the EEOC that a complaint has already been filed with it. This practice seeks to channel complaints first to the EEOC which then "advises" the State agency, gives it sixty days, and then the EEOC automatically proceeds. The statute does not contemplate this procedure.

In the case before us the record does not show what the EEOC advised the Colorado commission nor how it did so. We have only the Colorado commission's response. This response, as mentioned above, noted that appellant had requested nothing further of the State commission, indicated that appellant was perhaps disappointed in it, and asked the EEOC to proceed. This reference shows, of course, that the same complaint theretofore presented to the Colorado commission was recognized. Thus this is not an instance where the State agency was unfamiliar with the complaint. Its letter of June 1, 1966, indicates that appellant was expected to return. We don't of course know whether other action would have been taken had appellant returned to it and presented another complaint. The deposition of the State director only states that the policies were undergoing substantial changes at the time. After careful consideration we cannot on this record say that submission to the Colorado commission by appellant would have been wholly futile.

We must thus apply the procedure and the time limits set by Congress which are explicit in the statute. The language is clear and needs no interpretation. However, there were important reasons set out in the legislative history as to why the complaints must first be filed with

the State agency when the State statute contains the required provisions. 110 Cong.Rec., part 10, 13008 and 12721 (1964), 88th Cong.2d Sess. The debates in Congress include a variety of views as to several sections of the Act, especially the provisions relating to conciliation; however, the sequence of State and federal action was debated with little or no evidence of a difference of opinion as to the meaning of the provisions proposed. It became a fundamental issue, and the subject of a significant compromise; thus the legislative history is also clear if it need be considered.

The court in Equal Employment Opportunity Comm'n v. Union Bank, 408 F.2d 867 (9th Cir.), held that the mandate is evident that the claimant must first proceed "under available state law before filing a charge with the EEOC." The time limitation for filing with the EEOC follows to permit the federal agency thereafter to consider the matter. For reasons Congress fully considered, the reference of complaints to the federal agency comes after their consideration by the States. See also Edwards v. North American Rockwell Corp., 291 F.Supp. 199 (C.D.Calif.).

In order to preserve this stated sequence and the statutory thirty day period in which to invoke federal agency authority, the holding must be that the appellant waited too long after final State action to take the matter to the EEOC, and thus the federal agency did not have authority to act, nor did the trial court.

The sequence and the time period is applicable under the statute to all types of allegedly unlawful discrimination. *It does not differentiate between continuing discrimination and isolated incidents.* The familiar "continuing violation" argument advanced by appellant and the EEOC would permit a complaint to be initially filed with it at any time whatever as to a continuing offense, and the elements of the Act considered above would thereby be destroyed.

AFFIRMED.

Nos. 209-69 Earl A. Love v. The Pullman Co.
Nos. 226-69 The Pullman Co. v. Earl A. Love

FAHY, Senior Circuit Judge, dissenting.

As the court points out, the trial court found the reopened 1965 case was terminated by the State Commission in July

of that year. No complaint was filed with the Equal Employment Opportunity Commission within thirty days thereafter. It follows, I agree, that § 706(d) (42 USCA § 2000e-5(d)) was not complied with, insofar as the reopened 1965 case is concerned. However, on May 23, 1966, as the court also points out, appellant sent a letter complaint to EEOC. Since the discrimination of which he had complained to the State Commission, and now complained to EEOC, was of a character which continued to the time of the filing, this complaint, if it were handled so as to meet the procedural requirements of the Act, initiated a new case.

To recognize that some discrimination is of a continuing character is not to say that repetitious complaints or reopenings may be unlimited. An administrative agency, as well as a court, has the power to prevent abuse of its process. But I find no such abuse here, just as this court found none when it accepted as valid an oral renewal in 1965 of Love's formal complaint made before the State Commission in 1963. In fact, our court now comments that had appellant filed his present complaint with EEOC within thirty days after he was notified that his 1965 complaint to the State Commission was terminated "there would be no question as to the (EEOC's) authority to act on such a complaint." The court makes no mention, however, of the requirement in § 706(d) (42 USCA § 2000e-5(d)) that a valid complaint to EEOC, if a state commission has taken jurisdiction, must be made within 210 days after the alleged employment practice occurred or within 30 days after receiving notice of the termination of state proceedings, whichever is earlier. If Love's renewed complaint before the state commission in 1965 was not justified by a continuing discrimination, any complaint to EEOC at this later time would clearly have been filed more than 210 days after the alleged unlawful employment practice which led to the 1963 complaint.

The absence of abuse is further evidenced by the acquiescence of all the parties in the propriety of the present proceedings as they went forward before EEOC. That agency treated the complaint of May 23, 1966 as a new complaint or renewal of an earlier one, not as an untimely effort to confer jurisdiction upon EEOC after the termina-

tion of earlier proceedings. Perhaps even more significantly, it was so treated by the State Commission itself. Furthermore, in the ensuing proceedings before EEOC, the Pullman Company also so treated it. It was only after EEOC had itself terminated the case initiated by the May 23, 1966 complaint and Love timely went to the District Court that the Pullman Company raised there the objection now accepted by our court.

It is apparent that the complaint of May 23, 1966 cannot be considered an abuse of the statutory scheme. This court nevertheless holds that EEOC's referral of this complaint to the State Commission was not compliance with § 706(b) (42 USCA § 2000e-5(b)). The court correctly observes that § 706(b) requires a complaint of employment discrimination to be filed before a state commission, if one exists, before it is to be considered by EEOC. To meet this requirement of the Act, EEOC adopted the practice of referring a charge, mistakenly filed initially with it, to the appropriate state agency, EEOC subsequently assuming jurisdiction.[1] The authority of EEOC to make such referrals has been embodied in an amendment of Regulation § 1601.12 (F.R. Doc. 68-13553, eff. Nov. 7, 1968):

> The aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the state or local agency pursuant to the provisions of § 706(b), and that unless the Commission is notified to the contrary, on the termination of state or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case.

This regulation was not in effect when EEOC referred Love's complaint to the State Commission, but, as indicated above, it merely formalized the earlier Commission procedure. That procedure, conforming to the statutory scheme, has been accepted, without being questioned, by the Third Circuit in *International Bhd. of Elec. Workers* v. *EEOC*, 398 F.2d 248 (3rd Cir. 1968). In that case, as in ours, a charge of discrimination was originally filed with EEOC, which referred the complaint to the state agency. The

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[1] G.C. Opin. 11/18/65 & 12/2/65; Comm. Dec. 12/30/65.

charging party never made a formal complaint directly to the state agency. The court nevertheless tacitly found compliance with § 706(b). EEOC had proceeded upon the original complaint after a subsequent request by the complaining party that it assume jurisdiction.

EEOC's past procedure and present regulations do not run counter to the policy of the Act. On the contrary, as the regulations state, "it is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the state and local agencies." [2] Yet, with no mention of the current regulations, the court rules inconsistently with them, and in my view thus unduly restricts the right of EEOC to entertain and expedite claims for which it has responsibility under the Act to seek a solution. I think we should keep in mind that,

> we are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class who are generally without substantial higher education, dot every "i" and cross every "t" on the way to the courthouse.[3]

The consistency of the EEOC procedure with the policy of the Act is emphasized by the facts of this case. The Colorado Commission, as a result of the 1963 and 1965 complaints, fully considered Love's complaint before EEOC was even aware of its existence. The State Commission had been unable to obtain an arrangement satisfactory to the parties, and, accordingly, terminated its proceedings. These unsuccessful efforts of the State Commission led Love to go to EEOC for relief: EEOC, in order to bring the matter within the statutory plan, that is, to enable the Colorado Commission to have the fullest opportunity to consider the complaint initially, referred it to that Commission. Because of the Colorado Commission's acquaintance with the Love grievance and with his dissatisfaction with the result of its efforts, it informed EEOC that it would waive jurisdiction over the matter. Only at this

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[2] Reg. § 1601.12, *supra.*

[3] *Antonopulos* v. *Aerojet-General Corp.*, 295 F. Supp. 1390, 5 (E.D.Cal. 1968).

point did EEOC assume jurisdiction. I think it was entitled to do so, and that after the termination of its proceedings the District Court obtained jurisdiction by the timely filing of suit by Love—that Love then came to the door of the court with quite valid credentials.[4] Accordingly, I respectfully dissent in appeal No. 209-69 from the court's affirmance of the District Court's order dismissing Love's complaint.[5]

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[4] I do not read *International Bhd. of Elec. Workers* v. *EEOC, supra,* as does the court. Moreover, it should be noted that *Washington* v. *Aerojet-General Corp.*, 282 F. Supp. 517 (C.D.Cal. 1968), also cited by the court, relied upon the case in the District Court which was reversed by the Third Circuit in the *IBEW* case, *supra.* See footnote 9, 282 F. Supp. at 522. And *EEOC* v. *Union Bank,* 408 F.2d 867 (9th Cir. 1969), also cited, does not oppose the position I take; for there the matter seems never to have been before the State agency at all.

[5] The cross-appeal of the Pullman Company, before us in appeal No. 226-69, takes issue with the District Court's ruling that the proceedings before the Colorado Commission were validly reopened in 1965, a ruling with which this court agrees. It is unnecessary for me to take a position on this matter since in any event I conclude that the complaint of May 23, 1966, validly set in motion proceedings which led to the timely filing by Love of his complaint in the District Court which in my opinion gave that court jurisdiction.

United States Court of Appeals
Tenth Circuit

[Filed Jul. 30, 1970, William L. Whittaker, Clerk]

EARL A. LOVE, *Plaintiff-Appellant,* v. THE PULLMAN COMPANY, an Illinois Corporation, *Defendant-Appellee,* and UNITED STATES OF AMERICA, and EQUAL EMPLOYMEN OPPORTUNITY COMMISSION, *Intervenors.*	No. 209-69.

United States Court of Appeals
Tenth Circuit

No. 209-69—July 1970 Term

Earl A. Love, *Plaintiff-Appellant,* v. The Pullman Company, an Illinois Corporation, *Defendant-Appellee,* and United States of America, and Equal Employment Opportunity Commission, *Intervenors.*	Appeal From The United States District Court For The District of Colorado (District Court No. C-899) *Opinion on Rehearing*

Hugh J. McClearn, Denver, Colorado (Van Cise, Freeman, Tooley & McClearn, Denver, Colorado, with him on the Brief), for Appellant, Earl A. Love.

Edward C. Eppich, Denver, Colorado (Neef, Swanson and Myer, Denver, Colorado, with him on the Brief), for Appellee, The Pullman Company.

Benjamin W. Mintz, Attorney, Department of Justice, Washington, D. C. (Stephen P. Passek, Attorney, Department of Justice, Washington, D. C., and James L. Treece, United States Attorney, with him on the Brief), for Intervenor, United States of America.

Russell Specter, Acting General Counsel, Washington, D. C. (Marian Halley, Attorney, with him on the Brief), for Intervenor, Equal Employment Opportunity Commission.

Before LEWIS, Chief Judge, FAHY, Senior Circuit Judge *, and SETH, Circuit Judge.

SETH, Circuit Judge.

Opinion on Rehearing

The Equal Employment Opportunity Commission argues for the first time on this rehearing the relationship of the effective date of Title VII of the Civil Rights Act of 1964 to the procedural and jurisdictional events. Title VII became effective on July 2, 1965, which was a date during which the Colorado Civil Rights Commission was attempting to provide some relief or remedy for the appellant. The record shows that the Commission discussed the complaint with The Pullman Company and advised Love that he could be promoted to the position of conductor, but under the existing Union contracts, his seniority as a conductor would be so low that he probably would be laid off. This was not a satisfactory prospect for appellant. This date, July 30, 1965, was determined by the trial court to be the termination date by the State authorities, and thus appellant's time for application for relief to the EEOC then began to run.

The EEOC on this rehearing now urges that the pre-July 2, 1965, event be disregarded as being ineffective as antedating Title VII. We agree with this position, but it does not materially alter the consideration of the events.

The termination by the Colorado Commission on July 30, 1965, could only have been of proceedings which related to events conditions, or acts which took place before the effective date of the Act, and insofar as these asserted acts of discrimination they could not have been within the jurisdiction of the EEOC. Crosslin v. Mountain States Telephone & Telegraph Co., 38 U.S.L.Week 2514, — F.2d — (9th Cir.); Nishiyama v. North American Rockwell Corp., U.S. D.C., Cent.Dis.Calif., #68-1423-AAH; Griggs v. Duke Power Co., 292 F.Supp. 243 (M.D.N.C.); Dobbins v. Local 212, Int'l Bhd. of Elec. Workers, 292 F.Supp. 413 (S.D. Ohio); Banks v. Local Union 136, Int'l Bhd. of Elec. Workers, 296 F.Supp. 1188.(N.D.Ala.).

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* Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

Thus the first post effective date that events could have been considered under the record before us were those referred to in the letter of complaint of May 23, 1966, sent by appellant directly to the EEOC. This was the letter the Commission did not file but suspended until the Colorado Commission was advised and a reply received on June 1, 1966. Then according to the arguments and briefs of the EEOC it "... automatically accepted the charge for filing." This determination of the time for filing was made by the Commission without further correspondence from the appellant as apparently later became the procedure, as described in the prior opinion of this court. International Bhd. of Elec. Workers v. United States Equal Employment Opportunity Comm'n, 398 F.2d 248 (3d Cir.).

The regulations of the Commission did not contemplate or permit such a manipulation of the filing date, and it is contrary to uniform practice before Governmental agencies. We are strongly urged to consider regulations adopted at a later date, but this cannot be done, even if the method could be regularized by the adoption of regulations.

It must be pointed out that if complaints of this nature are so received by the EEOC but not "filed" until a reply is received from a State agency or until sixty days have elapsed, it is entirely possible and even likely that the time for appeal of the person complaining may have elapsed by reason of prior termination by State authorities. Under these circumstances, the EEOC to save the appeal would have to "file" the complaint at a date much earlier than the day on which the situation became known to it. The post-date filings made "automatically" by the EEOC as described on this appeal have little to recommend them over pre-dating the "filings" to a date before the day such act was accomplished.

The EEOC here argues that it need only advise the State agency of the complaint. In its brief it states that section 706(b) ". . . requires only that a state agency be given notice of the claim and 60 days in which to deal with it before the EEOC may assume jurisdiction over the case . . .," and elsewhere that the requirements are met if it ". . . informs the state agency of the pendency of a charge. . . ." This without further word or act by the complainant to permit the EEOC to then "automatically"

assert jurisdiction after sixty days does not comply with the Act as described in the prior opinion.

The action of the trial court in treating appellee's motion as one for summary judgment and the granting of the motion is affirmed for the reasons stated in this opinion on rehearing and as set forth in the prior opinion.

AFFIRMED.

LEWIS, Chief Judge, concurring.

I concur in the affirmance of this judgment on its record facts for to do otherwise would give judicial approval to administrative "flexible" filing to obtain, postpone, or reject jurisdiction. Admittedly those persons seeking relief under the Act are usually uninformed as to procedural necessities, often present their problem in letter form and directly to the Commission, and so need regulatory or legislative protection to preserve their basic rights against unnecessary procedural bars. But this problem is not unique with this Commission and its solution certainly does not lie in the approval of the manipulated procedures reflected in this record. To do so, might well, under different facts, penalize compliance as well as reward noncompliance with the requirements of the Act.

No. 209-69—EARL A. LOVE v. THE PULLMAN COMPANY

On Rehearing

FAHY, *Senior Circuit Judge, Dissenting:* With a modification to be mentioned I adhere to the views expressed in my dissenting opinion filed September 22, 1969. In light of the fact that Title VII of the Civil Rights Act of 1964 did not become effective until July 2, 1965, I agree with the opinion of the court on rehearing that the correct basis for deciding that the Equal Employment Opportunity Commission did not have jurisdiction of the reopened 1965 case is that the conduct complained of occurred prior to July 2, 1965, rather than as stated in my dissent of September 22, 1969.

United States Court of Appeals
Tenth Circuit

SEPTEMBER TERM, SEPTEMBER 22, 1969

No. 209-69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION,
DEFENDANT-APPELLEE

Before Honorable David T. Lewis, Honorable Charles Fahy and Honorable Oliver Seth.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is affirmed. Honorable Charles Fahy dissents.

WILLIAM L. WHITTAKER,
Clerk,

By RUTH H. JACOBSON,
Deputy Clerk.

United States Court of Appeals
Tenth Circuit

JULY TERM—JULY 30, 1970

No. 209–69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE

and

UNITED STATES OF AMERICA, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERVENORS

Before Honorable David T. Lewis, Chief Judge; and Honorable Charles Fahy, Senior Circuit Judge; and Honorable Oliver Seth, Circuit Judge

This cause came on to be heard on rehearing, and was argued by counsel. Upon consideration whereof, it is ordered that the judgment of the United States District Court for the District of Colorado is affirmed. Lewis, Chief Judge, specially concurring; Fahy, Senior Circuit Judge, dissenting.

WILLIAM L. WHITTAKER, *Clerk,*
HELEN R. BARTHA, *Deputy Clerk.*

Supreme Court of the United States

No. 957– , October Term, 1970

United States, et al.,
Petitioners,

v.

The Pullman Company

Order Allowing Certiorari. Filed February 22, 1971.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with No. 6018 and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 6018– . , October Term, 1970

Earl A. Love, et al.,

Petitioners,

v.

The Pullman Company

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is consolidated with No. 957 and a total of one hour is allotted for oral argument.

February 22, 1971

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

THE PULLMAN COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States and the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.[1]

OPINIONS BELOW

The opinion on rehearing (App. B, *infra*, p. 29) and the original opinion of the court of appeals (App. A, *infra*, p. 15) are not yet officially reported. The opinion of the district court (App. E, *infra*, p. 39) is not officially reported.

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[1] Earl A. Love, plaintiff below, has also filed a petition seeking review of this decision (No. 6018, this Term). Should the petitions be granted, the Court may wish to consolidate the cases.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on July 30, 1970 (App. D, *infra*, p. 37). On October 27, 1970, Mr. Justice White extended the time for petitioning for a writ of certiorari to November 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Under Section 706(b) of Title VII of the Civil Rights Act of 1964, "no charge" of discrimination "may be filed" with the United States Equal Employment Opportunity Commission until it has been filed with a state agency empowered to seek relief from employment discrimination, if one exists, and 60 days have expired or the state agency has terminated its jurisdiction, whichever is earlier. If EEOC is unable to conciliate the charge, Title VII authorizes the private party to file suit.

The question presented is whether a district court is without jurisdiction to entertain a suit alleging racial discrimination in employment in violation of Title VII because the Equal Employment Opportunity Commission, after receiving a written charge from the complainant, referring it to the appropriate state fair employment practices commission and waiting until that agency had terminated its jurisdiction, investigated the original charge without immediately obtaining an additional written charge or authorization from the complainant.

STATUTE AND REGULATIONS INVOLVED

Section 706(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(b)), states in part:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated * * *.

Section 706(d), 42 U.S.C. 2000e–5(d), states in part:

> A charge * * * with respect to which the person aggrieved has followed the procedure set out in subsection (b), of this section, * * * shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings * * * whichever is earlier * * *.

The pertinent present regulation of the Equal Employment Opportunity Commission, 29 C.F.R. 1601.12, provides:

> (a) In order to give full weight to the policy of section 706(b) of the Act which affords State and local fair employment practice agencies that

fall within the provisions of that section an opportunity to resolve disputes involving alleged discrimination concurrently regulated by Title VII of the Civil Rights Act of 1964 and State or local law, the Equal Employment Opportunity Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to the State or local agency. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to the State or local agency as is permitted by law and is practicable. It is the experience of the Commission that because of the complexities of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of protection of the Act. Accordingly, it is the intent of the Commission to simplify filing procedures for parties in deferral States and localities, and thereby avoid the accidental forfeiture of important Federal rights.

(b) The following procedures shall be followed with respect to cases arising in the localities to which the Commission defers:

(1) Any document, whether or not verified, filed at any field office of the Equal Employment Opportunity Commission or at Washington, D.C., which may constitute a charge cognizable under title VII, shall be deferred to the

appropriate State or local agency pursuant to the procedures set forth below.

(i) All such documents shall be date and time stamped on receipt.

(ii) A copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate State or local agency.

(iii) The aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the State or local agency pursuant to the provisions of section 706(b), and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case. Where the State or local agency terminates its proceedings within 60 days of the date of receipt of the document without notification to the Commission of such action, the date on which the aggrieved party is notified of the termination of the State or local action shall be deemed to be the date that the document was filed as a charge with the Commission.

(iv) The sixty-day period shall be deemed to have commenced on the receipt of the document by the State or local agency as evidenced by the date indicated on the return receipt. On notification of termination of State proceedings or the expiration of 60 days, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case .

* * * * *

The regulation in effect at the time the charge in this case was lodged with the Equal Employment Opportunity Commission (30 Fed. Reg. 8408) provided:

> In any instance in which an aggrieved person seeks to file a charge and it appears from the charge or from other information that the aggrieved person has not begun proceedings before a State or local authority pursuant to section 706(b) of Title VII, the Commission may not accept the charge of filing, but shall assist the aggrieved person in complying with section 706(b).

STATEMENT

This suit was brought by Earl A. Love, a black man, against respondent Pullman Company for refusing to promote him to the position of "conductor." An employee of respondent for approximately forty-five years, Mr. Love alleged he was performing the duties of a conductor under the job title of "porter-in-charge," an all-Negro classification, and that he had not been promoted to the higher paying position of conductor because it was restricted to whites.

Mr. Love initially filed a written charge of discrimination with the Colorado Civil Rights Commission in 1963. Apparently, no action was taken. He renewed his complaint orally to the same office in 1965. By letter of July 30, 1965, the Colorado Commission advised Mr. Love that the company offered to make him a conductor but without seniority. Mr. Love declined the offer because of the lack of job security which would result from loss of his seniority.

Mr. Love wrote to the Equal Employment Opportunity Commission on May 23, 1966, again alleging that he was being denied the higher pay and other benefits of a conductor because of his race. The EEOC informed the Colorado Commission that the charges were apparently within the latter's jurisdiction. On June 1, 1966, the Colorado Commission, by letter, declined to assume jurisdiction, specifically waived the 60-day requirement of Section 706(b), and asked the EEOC to proceed. EEOC then began a formal investigation without further communication with Mr. Love. On July 23, 1966, Mr. Love signed a formal charge on an EEOC form.

The Commission subsequently found cause to believe that there was discrimination on the part of respondent. Its efforts at conciliation were not successful, however, and it advised Mr. Love on May 3, 1968, that he had thirty days in which to bring suit. He filed suit on May 28, 1968.

The district court granted respondent's motion for summary judgment on the ground that Mr. Love had allowed the statute of limitations to run by not filing a complaint with the EEOC within thirty days of July 30, 1965, the date of the letter from the Colorado Commission to him. (App., *infra,* p. 42). The court of appeals, Senior Judge Fahy dissenting, affirmed, adding, as a separate ground for EEOC's lack of jurisdiction, the fact that the complaint had not been refiled with the EEOC after being referred to the state commission (App. *infra,* pp. 20–23).

408-767—70——2

Mr. Love moved for rehearing *en banc*. The United States and the EEOC each intervened in support of the motion. The petition for rehearing was referred to the original panel. It held that its original decision was erroneous insofar as it rested on the failure of Mr. Love to file a complaint with the EEOC within 30 days of the state commission's letter of July 30, 1965, since the discrimination complained of took place prior to the effective date of the Act (July 2, 1965). The court, however, reaffirmed its decision on the second ground. It held that the letter of May 23 could not serve as a complaint to the EEOC, since it had not then been filed with the state commission; that it did not toll or suspend the 30-day period of limitations of Section 706(d), which began to run on June 1; and that the EEOC was without authority to treat it as filed on or after June 1 "without further word or act by the complainant" (App., *infra*, p. 33).[2] While the court did not discuss the formal charge filed by Mr. Love on July 23, after the statute of limitations had run, it apparently considered this defect jurisdictional, even as to discrimination of a continuing character.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals potentially affects more than one-fourth of the charges annually filed with the Equal Employment Opportunity Commission, including many that are presently pending

[2] The court stated that the Commission's regulations at that time "did not contemplate or permit such manipulation of the filing date," and said that in any event such a filing procedure could not "be regularized by the adoption of regulations" (App., *infra*, p. 32).

before the Commission, and could thus seriously impair the rights of numerous individuals to enforce the equal employment opportunity provisions of Title VII of the Civil Rights Act by private suit. The holding is, moreover, in conflict with the rationale of the Court of Appeals for the Third Circuit in a closely analogous situation. Review by this Court is needed to clarify the procedural requirements of Title VII in order to protect the rights of complainants to have their claims adjudicated on the merits.

1. From the time that Title VII became effective, many complainants have filed charges of racially discriminatory employment practices initially with EEOC rather than the appropriate state agency. The Commission has consistently referred these complaints to the state agency and, after waiting until expiration of the 60-day statutory period (or until the state agency terminated its proceedings, if earlier), has then accepted the complaints for formal filing. For the first 3 years, EEOC usually (but not always) wrote to the charging party at this time to determine whether he wanted it to assume jurisdiction. Since November 1968, the Commission regulation (*supra*, pp. 3–5) has provided that it will automatically assume jurisdiction over these charges after the expiration of the deferral period.

The original opinion of the court of appeals appeared to prohibit altogether EEOC's practice of retaining a copy of the charge and treating it as filed after the deferral period. The opinion on rehearing stressed the fact that EEOC had accepted the present

charge for filing "automatically" after receipt of the Colorado Commission's letter declining jurisdiction "without further correspondence" from the charging party (App., *infra*, p. 32). At a minimum, therefore, the rationale of the court of appeals applies to all charges received initially by EEOC, from complainants in states having enforcement agencies,[3] after the effective date of the November 1968 regulations.[4] More than 7,000 such complaints have been filed since that time.[5]

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[3] There are state fair employment agencies in at least 30 states, including California, New York, Ohio and Illinois. Approximately 25 percent of all charges are initially filed with it instead of with the state commission.

[4] At the time of the writing of this petition, the Senate had passed S. 2453, which, among other things, amends the language of Section 706(b) to delete the term "no charge may be filed," in order to clarify congressional intent that the Commission may receive the charge, but may not take action with respect to it until the prescribed period has elapsed. S. Rep. 91-1137, 91st Cong., 2d Sess., pp. 22, 43. Section 11 of this bill provides, however, that "[t]he amendments * * * shall not be applicable" to pending charges. See 116 Cong. Rec. (daily ed., October 1, 1970) S 16917.

[5] The courts of appeals for the Fifth and Seventh Circuits have recently held that district courts have jurisdiction over suits involving employment discrimination under 42 U.S.C. 1981, notwithstanding the complainant's failure to follow the procedure prescribed in Title VII. *Sanders* v. *Dobbs House, Inc.*, 2 FEP Cases 942 (C.A. 5, No. 29029, August 28, 1970); *Waters* v. *Wisconsin Steel Workers*, 2 FEP Cases 574 (C.A. 7, No. 17895, April 28, 1970). It is therefore not clear that these complainants would lose all of their judicially enforceable rights with respect to the alleged discriminatory practices of which they complain. Regardless of whether complainants retain the right to sue, the decision below, by depriving EEOC of jurisdiction, frustrates the congressional intent that EEOC be afforded an opportunity to conciliate prior to the filing of suit.

2. The Commission's practice of referring charges initially lodged with it to the appropriate state agency and then treating them as "filed" after the expiration of the deferral period properly implements the policies and requirements of Title VII. The Commission's function is to investigate and conciliate charges of discrimination, but only after the state agencies have had a reasonable time within which to remedy the alleged discrimination. See 110 Cong. Rec. 12725 (Sen. Humphrey). As Judge Fahy emphasized in his dissent below, the people whom Title VII is designed to help and whose complaints are relied upon to trigger the enforcement process are largely working men who cannot be expected to know the procedural intricacies of Title VII. EEOC's complaint-filing practice justly accommodates the states' interest under Title VII in having first opportunity to cure discrimination with the basic congressional purpose to vindicate individual rights against discrimination (App., *infra*, p. 27).

The only other appellate ruling on EEOC's complaint-filing procedure, *International Brotherhood of Electrical Workers, Local 5* v. *EEOC*, 398 F. 2d 248 (C.A. 3), certiorari denied, 393 U.S. 1021, essentially conflicts with the ruling below. In that case, as here, the complainant wrote initially to the EEOC. The Commission advised the state agency of the charge and after that agency allowed 60 days to pass without taking final action, treated the charge as having been formally filed with it. The complainant thereafter filed a "formal charge" on an EEOC form more than thirty days after the state agency had concluded its

proceedings. The court ruled that the letter was not "a valid charge when received" by EEOC because it had not been sent to the state agency, but that this defect was cured and the letter became an effective charge after it was referred to the agency and the deferral period expired. 398 F. 2d 248, 252.

The majority of the court below ruled that the *International Brotherhood of Electrical Workers, Local 5* case was distinguishable because the EEOC there had sought and received a reauthorization from the charging party before proceeding with its investigation (App., *infra*, p. 32). Formal reauthorizations are generally without practical consequence, however, for EEOC's practice is to interview the complainant prior to commencing any investigation. Thus, if he does not wish to proceed, he can withdraw his charge at this time. In the present case, of course, the initial interview was unnecessary. Mr. Love had complained to EEOC just seven days before it assumed jurisdiction. The state agency refused to consider the complaint and took no other action. There was thus no basis to believe that there had been any change in circumstances during the brief interval between referral to the state agency and termination of its proceedings which would cause Mr. Love to wish to withdraw the complaint for which he initially sought the help of EEOC.

3. The court's implicit ruling that the 30-day statute of limitations under Section 706(d) deprived the district court of jurisdiction, even where the discrimination is of a continuing character, is also at odds with the generous attitude displayed by other courts

of appeals toward procedural irregularities in the filing of complaints with the EEOC.[6] It was not, moreover, required by the underlying policies for which statutes of limitations exist. There was no unfairness or prejudice to respondent, who had been aware of Mr. Love's charge of discrimination at least since 1965 when it made an offer of settlement to him; nor was there any lack of diligence on the part of Mr. Love. In a comparable situation, this Court held that the interests of vindicating rights of individuals outweigh the statute's policy of repose. *Burnett* v. *New York Central R. Co.*, 380 U.S. 424.

For these reasons, as well as those previously stated, the court of appeals should have ruled that the initial defective filing with the EEOC was later cured by referral to and waiver of jurisdiction by the state agency, and that it tolled the statute of limitations.

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[6] See *Sanchez* v. *Standard Brands*, 2 FEP Cases 788 (C.A. 5, No. 27730, July 1, 1970) (incomplete or erroneous statement of charges with EEOC can be amended after expiration of the limitations period); *Culpepper* v. *Reynolds Metals Company*, 421 F.2d 888 (C.A. 5) (pursuit of remedies available under the collective bargaining agreement is sufficient to toll the statute of limitations for filing charges with EEOC under Title VII); see, also, *Georgia Power Co.* v. *EEOC*, 412 F.2d 462 (C.A. 5); *Miller* v. *International Paper Co.*, 408 F. 2d 283 (C.A. 5); *Johnson* v. *Seaboard Air Line R.R. Co.*, 405 F. 2d 645 (C.A. 4), certiorari denied *sub nom. Pilot Freight Carriers, Inc.* v. *Walker*, 394 U.S. 918; *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1970.

APPENDIX A

United States Court of Appeals
Tenth Circuit

AUGUST 1969 TERM

No. 209–69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE

No. 226–69

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-CROSS APPELLANT

v.

EARL A. LOVE, PLAINTIFF-CROSS APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (DISTRICT COURT NO. C-899)

Hugh J. McClearn, Denver, Colorado (Frederick Miles, and Van Cise, Freeman, Tooley & McClearn, Denver, Colorado, with him on the Briefs), for Appellant and Cross-Appellee.

Edward C. Eppich, Denver, Colorado (Neef, Swanson, and Myer, Denver, Colorado, with him on the Brief), for Appellee and Cross-Appellant, The Pullman Company.

408-767—70——3

Marian Halley, Attorney, Washington, D.C. (Daniel Steiner, General Counsel, and Russell Specter, Assistant General Counsel, with her on the Brief), for United States Equal Employment Opportunity Commission, as Amicus Curiae.

Before FAHY, Senior Circuit Judge*, LEWIS and SETH, Circuit Judges.

SETH, Circuit Judge.

Appellant brought suit pursuant to 42 U.S.C.A. § 2000e–5(f), a portion of Title VII of the Civil Rights Act of 1964, alleging that he was discriminated against in employment because he was a Negro. The appellee moved to dismiss the complaint on the ground that the charge was not timely filed with the Equal Employment Opportunity Commission and that appellant's cause of action was moot. The trial court treated appellee's motion as a motion for summary judgment, and granted it. This appeal was then taken. The Equal Employment Opportunity Commission has filed a brief as amicus curiae.

Appellant was employed by the appellee for more than forty years as a Pullman porter. He resigned from this position in November 1968. In 1951 the appellant was classified and began to perform the duties of a "porter in charge." Appellant states that the duties of a porter in charge are for all purposes identical to those of a Pullman conductor, and that porters in charge must at all times be available to

*Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

work as such a conductor. Porters in charge however receive substantially lower wages than do conductors.

In his suit, appellant asserts that he has been restricted to the classification of porter in charge because of his race and that the classification of conductor is primarily an all-white classification from which Negroes were excluded.

The trial court found that in 1963 the appellant filed a written charge of discrimination with the Colorado Civil Rights Commission and that in 1965 he orally restated his complaint to that same commission. The court found also that this oral statement did not literally comply with the Colorado statute governing the same, but it was substantial compliance. The court found that the appellant's case was thereby reopened in 1965, but the commission was unable to reach an arrangement with The Pullman Company that was satisfactory to the appellant. The company advised the commission they would promote the appellant to conductor, but by reason of the union contracts he would be very low in seniority as a conductor and that he would probably be laid off. The commission so advised the appellant by letter. This was found by the trial court to have terminated the proceedings on appellant's complaint in July 1965.

Thereafter, on May 23, 1966, appellant sent a letter of complaint to the Equal Employment Opportunity Commission (EEOC) in Washington making the same complaint that he had to the Colorado commission. When the EEOC received appellant's letter it, in some way undisclosed in the record, informed the Colorado commission that it had received a charge of discrimination which appeared to be within the jurisdiction of the Colorado commission. By letter of June 1, 1966,

the Colorado commission advised the EEOC that in light of its prior contacts with the appellant and his failure to return to file a complaint, the commission would not "accept" the sixy day deferment period, waived it, and asked the EEOC to proceed.

The EEOC then served a copy of the charge on the appellee and began an investigation. A charge on an EEOC form signed by appellant dated July 23, 1966, also appears in the record, and we assume this supplemented his original letter of May 23, 1966.

A "Final Investigative Report" by a Regional Director of the EEOC found no violation of Title VII. He instead found that the Sleeping Car Porters Union and The Pullman Company were in violation of the Act by reason of their union contract. He recommended that a commissioner's charge be brought on this basis. The commission thereafter found otherwise and issued its Decision that there was instead reasonable cause to believe that there was discrimination. On May 3, 1968, the EEOC notified the appellant that it had been unable to secure the appellee's voluntary compliance with Title VII and that the appellant had thirty days in which to bring suit.

The appellant then duly filed a complaint and later an amended complaint on behalf of himself and of all persons similarly situated who had suffered from the appellee's alleged discriminatory employment practice. The appellant also prayed that appellee be enjoined from classifying its employees on the basis of race and sought back pay for himself and for the class of persons situated as himself in the amount of the difference between the wages they had earned and what they would have earned but for appellee's discrimination.

The trial court in granting summary judgment in favor of the appellee ruled that since the Colorado

Civil Rights Commission had terminated its proceedings on appellant's complaint on July 30, 1965, and inasmuch as appellant did not file his charge with the EEOC until May 23, 1966, or more than thirty days after termination, appellant had failed to comply with section 706(d) [42 U.S.C.A. § 2000e–5(d)].

The trial court also ruled that since the appellant had resigned from employment with the appellee in November 1968, his request for injunctive relief was moot.

We must affirm the trial court on the timeliness of filing issue, and to thereby give effect to the time limits expressed in the statute.

It is clear that the Colorado Civil Rights Commission acts under a Colorado statute prohibiting the employment practice alleged and establishing state authority to grant or seek relief all as contemplated in section 706(d) of the 1964 Civil Rights Act [42 U.S.C.A. § 2000e–5]. Since the Colorado statute and the State commission so come within the terms of section 706(b) of the Act, no charge can be filed with the EEOC under section 706(a) until after the expiration of sixty days after proceedings are commenced in the State, unless the State proceedings terminate within such time. Further the Act in section 706(d) [42 U.S.C.A. § 2000e–5(d)] provides that filing with the EEOC must be made under these circumstances within two hundred ten days after the alleged unlawful employment practice occurred, "or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, * * *"

The trial court found, and the record shows, that the Colorado commission terminated its proceedings on plaintiff's complaint on July 30, 1965, and so noti-

fied him. We also agree that this second period of consideration was an effective reopening of prior proceedings on the same complaint. Thus if appellant had filed his complaint with the EEOC within thirty days thereafter there would be no question as to its authority to act on such a complaint. Appellant did not do so but waited until some time later and mailed a letter of complaint to the EEOC.

The appellant, and the EEOC as amicus curiae, argue here that this letter to the EEOC started a new chain of events, and they ignore the prior failure by appellants to comply with the time requirements. The EEOC, to sustain this position, urges that upon receipt of a complaint letter directly from an individual as the appellant here, it may hold it in some sort of suspense and "advise" the State commission concerned. Then at the end of the period the State has to consider complaints (sixty days) the commission can then automatically "assume jurisdiction," as if the complaint had been made directly to the State agency and, thereafter within the time limit, filed with the commission.

As indicated above, we must affirm the trial court in its holding that the time limit was ignored as to the complaint appellant himself filed with the Colorado commission. We also hold that the device used by the EEOC to start a new time sequence was ineffective to do so. Under the Act, when the appellant's letter to the EEOC was received it was thereby filed as the filing date cannot be manipulated by the commission. Its own regulations state "* * * a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." The charge was apparently definite enough for the EEOC

to advise the Colorado commission although the record does not show how this was done. The EEOC in its brief also states: "It is established beyond question that a charge, originally in the form of a letter, may later be reduced to proper form, and that the later official charge will relate back to the date of the letter." Thus the charge here concerned was filed when received, and at that time the EEOC had no authority over the matter because it had then not yet been presented to the Colorado commission.

In *International Bhd. of Elec. Workers* v. *United States Equal Employment Opportunity Comm'n,* 398 F.2d 248, the Third Circuit held that a charge when filed with the EEOC before the expiration of the State's sixty day period was not then valid. The same situation here prevails because appellant's charge was filed with the EEOC before Colorado had a chance to act on it. The court in *I.B.E.W.* however found a subsequent charge filed within the statutory time intervals and sequence was valid and within the two hundred ten day period.

The trial court in the case at bar also had no statutory power to hear the case because the EEOC also lacked such authority. The trial court so held. See *Washington* v. *Aerojet-General Corp.,* 282 F.Supp. 517 (C.D. Calif.), where the date of receipt and the date of filing were also considered.

The Civil Rights Act of 1964 is precise in its requirements that the States with adequate statutes and machinery have the first opportunity to consider complaints. This first opportunity is a clear requirement in the sequences set out in the Act. This opportunity cannot come by an advice from the EEOC that a complaint has already been filed with it. This practice seeks to channel complaints first to the EEOC which then "advises" the State agency, gives it sixty

days, and then the EEOC automatically proceeds. The statute does not contemplate this procedure.

In the case before us the record does not show what the EEOC advised the Colorado commission nor how it did so. We have only the Colorado commission's response. This response, as mentioned above, noted that appellant had requested nothing further of the State commission, indicated that appellant was perhaps disappointed in it, and asked the EEOC to proceed. This reference shows, of course, that the same complaint theretofore presented to the Colorado commission was recognized. Thus this is not an instance where the State agency was unfamiliar with the complaint. Its letter of June 1, 1966, indicates that appellant was expected to return. We don't of course know whether other action would have been taken had appellant returned to it and presented another complaint. The deposition of the State director only states that the policies were undergoing substantial changes at the time. After careful consideration we cannot on this record say that submission to the Colorado commission by appellant would have been wholly futile.

We must thus apply the procedure and the time limits set by Congress which are explicit in the statute. The language is clear and needs no interpretation. However, there were important reasons set out in the legislative history as to why the complaints must first be filed with the State agency when the State statute contains the required provisions. 110 Cong. Rec., part 10, 13008 and 12721 (1964), 88th Cong. 2d Sess. The debates in Congress include a variety of views as to several sections of the Act, especially the provisions relating to conciliation; however, the sequence of State and federal action was debated with little or no evidence of a difference of

opinion as to the meaning of the provisions proposed. It became a fundamntal issue, and the subject of a significant compromise; thus the legislative history is also clear if it need be considered.

The court in Equal Employment Opportunity Comm'n v. Union Bank, 408 F.2d 867 (9th Cir.), held that the mandate is evident that the claimant must first proceed "under available state law before filing a charge with the EEOC." The time limitation for filing with the EEOC follows to permit the federal agency thereafter to consider the matter. For reasons Congress fully considered, the reference of complaints to the federal agency comes after their consideration by the States. See also Edwards v. North American Rockwell Corp., 291 F.Supp. 199 (C. D. Calif.).

In order to preserve this stated sequence and the statutory thirty day period in which to invoke federal agency authority, the holding must be that the appellant waited too long after final State action to take the matter to the EEOC, and thus the federal agency did not have authority to act, nor did the trial court.

The sequence and the time period is applicable under the statute to all types of allegedly unlawful discrimination. It does not differentiate between continuing discrimination and isolated incidents. The familiar "continuing violation" argument advanced by appellant and the EEOC would permit a complaint to be initially filed with it at any time whatever as to a continuing offense, and the elements of the Act considered above would thereby be destroyed.

Affirmed.

FAHY, *Senior Circuit Judge,* dissenting.

As the court points out, the trial court found the reopened 1965 case was terminated by the State Com-

mission in July of that year. No complaint was filed with the Equal Employment Opportunity Commission within thirty days thereafter. It follows, I agree, that § 706(d) (42 USCA § 2000e–5(d)) was not complied with, insofar as the reopened 1965 case is concerned. However, on May 23, 1966, as the court also points out, appellant sent a letter complaint to EEOC. Since the discrimination of which he had complained to the State Commission, and now complained to EEOC, was of a character which continued to the time of the filing, this complaint, if it were handled so as to meet the procedural requirements of the Act, initiated a new case.

To recognize that some discrimination is of a continuing character is not to say that repetitious complaints or reopenings may be unlimited. An administrative agency, as well as a court, has the power to prevent abuse of its process. But I find no such abuse here, just as this court found none when it accepted as valid an oral renewal in 1965 of Love's formal complaint made before the State Commission in 1963. In fact, our court now comments that had appellant filed his present complaint with EEOC within thirty days after he was notified that his 1965 complaint to the State Commission was terminated "there would be no question as to the (EEOC's) authority to act on such a complaint." The court makes no mention, however, of the requirement in § 706(d) (42 USCA § 2000e–5(d)) that a valid complaint to EEOC, if a state commission has taken jurisdiction, must be made within 210 days after the alleged employment practice occurred or within 30 days after receiving notice of the termination of state proceedings, whichever is earlier. If Love's renewed complaint before the state

commission in 1965 was not justified by a continuing discrimination, any complaint to EEOC at this later time would clearly have been filed more than 210 days after the alleged unlawful employment practice which led to the 1963 complaint.

The absence of abuse is further evidenced by the acquiescence of all the parties in the propriety of the present proceedings as they went forward before EEOC. That agency treated the complaint of May 23, 1966 as a new complaint or renewal of an earlier one, not as an untimely effort to confer jurisdiction upon EEOC after the termination of earlier proceedings. Perhaps even more significantly, it was so treated by the State Commission itself. Furthermore, in the ensuing proceedings before EEOC, the Pullman Company also so treated it. It was only after EEOC had itself terminated the case initiated by the May 23, 1966 complaint and Love timely went to the District Court that the Pullman Company raised there the objection now accepted by our court.

It is apparent that the complaint of May 23, 1966 cannot be considered an abuse of the statutory scheme. This court nevertheless holds that EEOC's referral of this complaint to the State Commission was not compliance with § 706(b) (42 USCA § 2000e–5(b)). The court correctly observes that § 706(b) requires a complaint of employment discrimination to be filed before a state commission, if one exists, before it is to be considered by EEOC. To meet this requirement of the Act, EEOC adopted the practice of referring a charge, mistakenly filed initially with it, to the appropriate state agency, EEOC subsequently assuming jurisdiction.[1] The authority of EEOC to make such referrals

[1] G. C. Opin. 11/18/65 & 12/2/65; Comm. Dec. 12/30/65.

has been embodied in an amendment of Regulation § 1601.12 (F.R. Doc. 68–13553, eff. Nov. 7, 1968):

> The aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the state or local agency pursuant to the provisions of § 706(b), and that unless the Commission is notified to the contrary, on the termination of state or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case.

This regulation was not in effect when EEOC referred Love's complaint to the State Commission, but, as indicated above, it merely formalized the earlier Commission procedure. That procedure, conforming to the statutory scheme, has been accepted, without being questioned, by the Third Circuit in *International Bhd. of Elec. Workers* v. *EEOC*, 398 F.2d 248 (3rd Cir. 1968). In that case, as in ours, a charge of discrimination was originally filed with EEOC, which referred the complaint to the state agency. The charging party never made a formal complaint directly to the state agency. The court nevertheless tacitly found compliance with § 706(b). EEOC had proceeded upon the original complaint after a subsequent request by the complaining party that it assume jurisdiction.

EEOC's past procedure and present regulations do not run counter to the policy of the Act. On the contrary, as the regulations state, "it is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the state and local agencies."[2] Yet, with no mention of the current regulations, the court rules inconsistently with them, and in my view thus unduly restricts the right of EEOC to entertain

[2] Reg. § 1601.12, *supra*.

and expedite claims for which it has responsibility under the Act to seek a solution. I think we should keep in mind that:

> we are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class who are generally without substantial higher education, dot every "i" and cross every "t" on the way to the courthouse.[3]

The consistency of the EEOC procedure with the policy of the Act is emphasized by the facts of this case. The Colorado Commission, as a result of the 1963 and 1965 complaints, fully considered Love's complaint before EEOC was even aware of its existence. The State Commission had been unable to obtain an arrangement satisfactory to the parties, and, accordingly, terminated its proceedings. These unsuccessful efforts of the State Commission led Love to go to EEOC for relief. EEOC, in order to bring the matter within the statutory plan, that is, to enable the Colorado Commission to have the fullest opportunity to consider the complaint initially, referred it to that Commission. Because of the Colorado Commission's acquaintance with the Love grievance and with his dissatisfaction with the result of its efforts, it informed EEOC that it would waive jurisdiction over the matter. Only at this point did EEOC assume jurisdiction. I think it was entitled to do so, and that after the termination of its proceedings the District Court obtained jurisdiction by the timely filing of

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[3] *Antonopulos* v. *Aerojet-General Corp.*, 295 F.Supp. 1390, 5 (E. D. Cal. 1968).

suit by Love—that Love then came to the door of the court with quite valid credentials.[4] Accordingly, I respectfully dissent in appeal No. 209–69 from the court's affirmance of the District Court's order dismissing Love's complaint.[5]

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[4] I do not read *International Bhd. of Elec. Workers* v. *EEOC*, *supra*, as does the court. Moreover, it should be noted that *Washington* v. *Aerojet-General Corp.*, 282 F.Supp. 517 (C.D. Cal. 1968), also cited by the court, relied upon the case in the District Court which was reversed by the Third Circuit in the *IBEW* case, *supra*. See footnote 9, 282 F. Supp. at 522. And *EEOC* v. *Union Bank*, 408 F. 2d 867 (9th Cir. 1969), also cited, does not oppose the position I take; for there the matter seems never to have been before the State agency at all.

[5] The cross-appeal of the Pullman Company, before us in appeal No. 226–69, takes issue with the District Court's ruling that the proceedings before the Colorado Commission were validly reopened in 1965, a ruling with which this court agrees. It is unnecessary for me to take a position on this matter since in any event I conclude that the complaint of May 23, 1966, validly set in motion proceedings which led to the timely filing by Love of his complaint in the District Court which in my opinion gave that court jurisdiction.

APPENDIX B

United States Court of Appeals
Tenth Circuit

No. 209–69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE

and

UNITED STATES OF AMERICA, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERVENORS

United States Court of Appeals
Tenth Circuit

No. 209–69—JULY 1970 TERM

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE

and

UNITED STATES OF AMERICA, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERVENORS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (DISTRICT COURT NO. C-899)

OPINION ON REHEARING

Hugh J. McClearn, Denver, Colorado (Van Cise, Freeman, Tooley & McClearn, Denver, Colorado, with him on the Brief), for Appellant, Earl A. Love.

Edward C. Eppich, Denver, Colorado (Neef, Swanson and Myer, Denver, Colorado, with him on the Brief), for Appellee, The Pullman Company.

Benjamin W. Mintz, Attorney, Department of Justice, Washington, D.C. (Stephen P. Passek, Attorney, Department of Justice, Washington, D.C., and James L. Treece, United States Attorney, with him on the Brief), for Intervenor, United States of America.

Russell Specter, Acting General Counsel, Washington, D.C. (Marian Halley, Attorney, with him on the Brief), for Intervenor, Equal Employment Opportunity Commission.

Before LEWIS, *Chief Judge,* FAHY, *Senior Circuit Judge**, and SETH, *Circuit Judge.*

SETH, *Circuit Judge.*

OPINION ON REHEARING

The Equal Employment Opportunity Commission argues for the first time on this rehearing the relationship of the effective date of Title VII of the Civil

*Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

Rights Act of 1964 to the procedural and jurisdictional events. Title VII became effective on July 2, 1965, which was a date during which the Colorado Civil Rights Commission was attempting to provide some relief or remedy for the appellant. The record shows that the Commission discussed the complaint with The Pullman Company and advised Love that he could be promoted to the position of conductor, but under the existing Union contracts, his seniority as a conductor would be so low that he probably would be laid off. This was not a satisfactory prospect for appellant. This date, July 30, 1965, was determined by the trial court to be the termination date by the State authorities, and thus appellant's time for application for relief to the EEOC then began to run.

The EEOC on this rehearing now urges that the pre-July 2, 1965, event be disregarded as being ineffective as antedating Title VII. We agree with this position, but it does not materially alter the consideration of the events.

The termination by the Colorado Commission on July 30, 1965, could only have been of proceedings which related to events, conditions, or acts which took place before the effective date of the Act, and insofar as these asserted acts of discrimination they could not have been within the jurisdiction of the EEOC. Crosslin v. Mountain States Telephone & Telegraph Co., 38 U.S.L. Week 2514, —— F. 2d —— (9th Cir.); Nishiyama v. North American Rockwell Corp., U.S. D.C., Cent. Dis. Calif., #68-1423-AAH; Griggs v. Duke Power Co., 292 F. Supp. 243 (M.D.N.C.); Dobbins v. Local 212, Int'l Bhd. of Elec. Workers, 292 F. Supp. 413 (S.D. Ohio); Banks v. Local Union 136, Int'l Bhd. of Elec. Workers, 296 F. Supp. 1188 (N.D. Ala.).

Thus the first post effective date that events could have been considered under the record before us were those referred to in the letter of complaint of May 23, 1966, sent by appellant directly to the EEOC. This was the letter the Commission did not file but suspended until the Colorado Commission was advised and a reply received on June 1, 1966. Then according to the arguments and briefs of the EEOC it "* * * automatically accepted the charge for filing." This determination of the time for filing was made by the Commission without further correspondence from the appellant as apparently later became the procedure, as described in the prior opinion of this court. International Bhd. of Elec. Workers v. United States Equal Employment Opportunity Comm'n, 398 F. 2d 248 (3d Cir.).

The regulations of the Commission did not contemplate or permit such a manipulation of the filing date, and it is contrary to uniform practice before Governmental agencies. We are strongly urged to consider regulations adopted at a later date, but this cannot be done, even if the method could be regularized by the adoption of regulations.

It must be pointed out that if complaints of this nature are so received by the EEOC but not "filed" until a reply is received from a State agency or until sixty days have elapsed, it is entirely possible and even likely that the time for appeal of the person complaining may have elapsed by reason of prior termination by State authorities. Under these circumstances, the EEOC to save the appeal would have to "file" the complaint at a date much earlier than the day on which the situation became known to it. The post-date filings made "automatically" by the EEOC as described on this appeal have little to recommend

them over, pre-dating the "filings" to a date before the day such act was accomplished.

The EEOC here argues that it need only advise the State agency of the complaint. In its brief it states that section 706(b) "* * * requires only that a state agency be given notice of the claim and 60 days in which to deal with it before the EEOC may assume jurisdiction over the case * * *," and elsewhere that the requirements are met if it "* * * informs the state agency of the pendency of a charge * * *." This without further word or act by the complainant to permit the EEOC to then "automatically" assert jurisdiction after sixty days does not comply with the Act as described in the prior opinion.

The action of the trial court in treating appellee's motion as one for summary judgment and the granting of the motion is affirmed for the reasons stated in this opinion on rehearing and as set forth in the prior opinion.

Affirmed.

LEWIS, *Chief Judge*, concurring.

I concur in the affirmance of this judgment on its record facts for to do otherwise would give judicial approval to administrative "flexible" filing to obtain, postpone, or reject jurisdiction. Admittedly those persons seeking relief under the Act are usually uninformed as to procedural necessities, often present their problem in letter form and directly to the Commission, and so need regulatory or legislative protection to preserve their basic rights against unnecessary procedural bars. But this problem is not unique with this Commission and its solution certainly does not lie in the approval of the manipulated procedures reflected in this record. To do so, migl.t well, under different facts, penalize compliance as well as reward noncompliance with the requirements of the Act.

FAHY, *Senior Circuit Judge, Dissenting.*

With a modification to be mentioned I adhere to the views expressed in my dissenting opinion filed September 22, 1969. In light of the fact that Title VII of the Civil Rights Act of 1964 did not become effective until July 2, 1965, I agree with the opinion of the court on rehearing that the correct basis for deciding that the Equal Employment Opportunity Commission did not have jurisdiction of the reopened 1965 case is that the conduct complained of occurred prior to July 2, 1965, rather than as stated in my dissent of September 22, 1969.

APPENDIX C

United States Court of Appeals
Tenth Circuit

SEPTEMBER TERM, SEPTEMBER 22, 1969

No. 209–69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE.

Before Honorable David T. Lewis, Honorable Charles Fahy and Honorable Oliver Seth.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is affirmed. Honorable Charles Fahy dissents.

WILLIAM L. WHITTAKER,
Clerk,

By RUTH H. JACOBSON,
Deputy Clerk.

APPENDIX D

United States Court of Appeals
Tenth Circuit

JULY TERM—JULY 30, 1970

No. 209–69

EARL A. LOVE, PLAINTIFF-APPELLANT

v.

THE PULLMAN COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE

and

UNITED STATES OF AMERICA, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERVENORS

Before Honorable David T. Lewis, Chief Judge; and Honorable Charles Fahy, Senior Circuit Judge; and Honorable Oliver Seth, Circuit Judges

This cause came on to be heard on rehearing, and was argued by counsel. Upon consideration whereof, it is ordered that the judgment of the United States District Court for the District of Colorado is affirmed. Lewis, Chief Judge, specially concurring; Fahy, Senior Circuit Judge, dissenting.

WILLIAM L. WHITTAKER, *Clerk,*
HELEN R. BARTHA, *Deputy Clerk.*

APPENDIX E

United States District Court
District of Colorado

Civil No. C–899

EARL A. LOVE, PLAINTIFF

v.

PULLMAN COMPANY, DEFENDANT

February 28, 1969

Hugh J. McClearn, Denver, Colorado, for Plaintiff.

Edward C. Eppich, Denver, Colorado, for Defendant.

ARRAJ Ch. J.: The plaintiff's action is based upon the provisions of 43 USCA, Section 2000–e–5 et seq., commonly referred to as Title VII of the Civil Rights Act of 1964. The plaintiff alleges that he has been employed by the defendant for a number of years as a porter, and for the last several years he has been performing the duties and responsibilities of the porter-in-charge, which are commensurate with the duties and responsibilities of a Pullman conductor, yet he received lower wages due to his race.

The defendant has moved to dismiss the action on the grounds that the court lacks jurisdiction over the subject matter and that the plantiff's cause of action has become moot. The defendant's motion is supported by the deposition of James Reynolds, Director of the Colorado Civil Rights Commission, together with the exhibits attached thereto. The record also contains facts which have been stipulated to by counsel for the

parties. Accordingly, the motion to dismiss filed by the defendant will be treated as a motion for summary judgment.

Before an action may be commenced under Title VII of the Civil Rights Act of 1964, 42 USCA, § 2000–e–5 et seq., there are certain statutory prerequisites which must be met before this court has jurisdiction over the subject matter of this type of action.

It is apparent from 42 USCA, § 2000–e–5(b), that if a state has a statute which prohibits the alleged unlawful employment practice, that no charge may be filed under the Civil Rights Act of 1964 with the EEOC until after proceedings have been commenced under the state law. The State of Colorado has such a statute (CRS 1963 80–21–1 et seq.) which has been in effect since 1957 and prohibits the type of employment practice alleged by Mr. Love. The Colorado statute (CRS 1963 81–21–7(1)) requires the filing of a written complaint with the Colorado Civil Rights Commission to commence proceedings there. The Colorado statute is recognized by the EEOC as a state law which requires deferral of the EEOC action under 42 USCA, § 2000–e–5(b).

The record before the court shows that in 1963 the plaintiff did file a written complaint with the Colorado Civil Rights Commission, but apparently this claim was not resolved, at least to the plaintiff's satisfaction. Thereafter, in the summer of 1965, the plaintiff again went to the Colorado Civil Rights Commission and restated his complaint to the Commission, but no written complaint was filed at that time; however, Mr. Reynolds, the director and head of the Colorado Civil Rights Commission, did contact the defendant who stated they would promote Mr. Love to the position of a conductor, but that he would probably be laid off because of the seniority

rules in effect. On July 30, 1965, the Colorado Civil Rights Commission so advised Mr. Love by letter.

It is the court's opinion that since Colorado has a state law prohibiting the discrimination alleged by the plaintiff and providing a remedy for such discrimination, that the language of 42 USCA, § 2000–e–5(b) requires that an aggrieved person exhaust his remedies through the state machinery before the EEOC and this court are conferred with jurisdiction over the subject matter. Although the plaintiff did not file a written complaint in 1965 with the Colorado Commission, he did file such a complaint in 1963. It is the court's opinion that the Colorado Civil Rights Commission treated the oral complaint in 1965 as a reopening of the 1963 matter, and that although there wasn't literal compliance with the wording of the statute there was substantial compliance. Accordingly, the court holds that the plaintiff's failure to file a written complaint in 1965 does not oust this court of jurisdiction.

42 USCA, § 2000-e-5(d) states inter alia: "In the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in sub-section (b) of this section, such charge shall be filed by the person aggrieved within 210 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the state or local agency has terminated the proceedings under the State or local law, whichever is earlier . . . ."

The Civil Rights Commission of the State of Colorado terminated its proceeding on July 30, 1965, and so notified Mr. Love. No further contact was had by Mr. Love with the State Commission. He filed his complaint with the EEOC on May 23, 1966.

It is the court's opinion that the state proceedings were effectively terminated on July 30, 1965, and that the plaintiff's period within which to file a complaint with the EEOC commenced on July 31, 1965. As Mr. Love did not file with the EEOC until May 23, 1966, it is the court's conclusion that the charge and complaint before the EEOC was not filed within the time required by 42 USCA, § 2000-e-5(d), and that the EEOC did not have jurisdiction to consider Mr. Love's charge. As Mr. Love's charge was not timely filed with that body, this court is also without jurisdiction to hear the complaint herein.

Furthermore, as to the plaintiff's claim for injunctive relief, it is obvious that inasmuch as the plaintiff has resigned his position with the defendant, which fact is admitted by the plaintiff, then the request for injunctive relief is moot.

There is no genuine issue of material fact, and the court as a matter of law concludes that the defendant's motion should be granted.

It is, therefore, Ordered that judgment be, and the same is, hereby granted in favor of the defendant, The Pullman Company, and that the judgment of dismissal of this action shall be entered forthwith.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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In the Supreme Court for the United States

OCTOBER TERM, 1970

No. 957

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

THE PULLMAN COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion on rehearing (A. 67-71) and the original opinion of the court of appeals (A. 56-66) are reported at 430 F.2d 49. The order of the district court (A. 12-14) is not officially reported.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on July 30, 1970 (A. 73). On Oc-

tober 27, 1970, Mr. Justice White extended the time for filing a petition for a writ of certiorari to November 12, 1970. The petition was filed on November 10, 1970, and was granted on February 22, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Under Section 706(b) of Title VII of the Civil Rights Act of 1964, "no charge" of discrimination "may be filed" with the United States Equal Employment Opportunity Commission until it has been filed with a state agency empowered to seek relief from employment discrimination, if one exists, and 60 days have expired or the state agency has terminated its jurisdiction, whichever is earlier. Section 706(d) requires that the charge be filed with the Commission within 30 days of receipt of notice that state proceedings have been terminated. If EEOC is unable to resolve the charge by conciliation, Title VII authorizes the private party to file suit.

The question presented is whether the district court was without jurisdiction to entertain the present suit alleging a violation of Title VII because the Commission, after having received a written charge from the complainant, referred it to the appropriate state fair employment practices commission, waited until that agency had terminated its jurisdiction, and then assumed jurisdiction of the original charge without having obtained an additional written charge or authorization from the complainant during the 30 days following termination of the state proceedings.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964 and regulations of the Equal Employment Opportunity Commission are set forth in Appendix A to this Brief (Br. App. A), *infra*, pp. 32-38.

STATEMENT

This suit was brought by Earl Love (petitioner in No. 6018, consolidated in this Court with the present case), a black man, against respondent Pullman Company, under Title VII of the Civil Rights Act of 1964, alleging that respondent had discriminated against him because of his race. The district court dismissed the suit, ruling that it was without jurisdiction because petitioner Love had not complied with the applicable procedural requirements and time limits of the Act. The court of appeals affirmed, Judge Fahy dissenting.

The Statutory Framework

Congress established a relatively complex procedural framework for implementation of Title VII's substantive goal of eliminating discrimination in employment on the basis of race, color, religion, sex, or national origin. The procedural provisions, particularly the series of time limits for various stages in the process of implementation, reflect a preference for voluntary settlement of claims of discrimination, primarily through the efforts of the Equal Employment Opportunity Commission and appropriate state and

local fair employment practices agencies. They also provide the aggrieved individual a prompt opportunity for judicial determination of his complaint.

The basic procedure is set forth in Section 706 of the Act, 42 U.S.C. 2000e-5, App. A, pp. 32-35. Section 706(a) establishes the Commission's authority to investigate charges filed by an aggrieved individual or a Commission member and, upon finding "reasonable cause to believe that the charge is true * * * [to] endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."

Section 706(d) requires that a charge be filed with the Commission "within ninety days after the alleged unlawful employment practice occurred" except in situations where there is a state or local agency authorized "to grant or seek relief from * * * or * * * institute criminal proceedings with respect" to discriminatory employment practices (Section 706(b)). In such cases, Section 706(b) requires that the non-federal agency have an initial opportunity to remedy alleged discrimination, and provides that no charge may be filed with the Commission "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." [1]

---

[1] Proceedings are "deemed to have been commenced" by Section 706(b) when "a written and signed statement of the facts upon which the proceeding is based * * * is sent by registered mail to the appropriate State or local authority."

In cases, such as this one, where complaints have been filed by individuals with the Commission before proceedings have been commenced under state or local law, the Commission has, by regulation, adopted the procedure of referring complaints to the appropriate state agency and subsequently assuming jurisdiction of them. See *infra*, pp. 13-15.[2] Where non-federal proceedings take place, Section 706(d) requires that the charge be filed with the Commission "within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings * * * whichever is earlier."

Section 706(e) allows the Commission 30 days (which may be extended by the Commission to 60 days) from the time a charge is filed to secure voluntary compliance. If the Commission is unable to obtain compliance, it must notify the person aggrieved, who may bring suit within 30 days.[3]

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[2] In the case of a charge filed by a member of the Commission under Section 706(e), the Commission is required by Section 706(c) to notify the appropriate state agency and afford it a "reasonable time," if it so requests, to consider the matter before the Commission takes any action. The statute makes no reference, however, to the procedure to be employed with respect to individual complaints filed initially with the Commission.

[3] The Commission is not empowered to issue cease and desist orders or to initiate enforcement suits. The Attorney General's enforcement authority is limited to initiating suits against persons engaged in a "pattern or practice of resistance to the full enjoyment" of Title VII rights (Section 707, 42 U.S.C. 2000e-6) and intervention in private actions "of * * *

It has, accordingly, been argued by advocates of a rigid application of the various time limits that the maximum time which may elapse between the date of the discriminatory conduct and the filing of suit is either 300 days, where there is an appropriate state or local agency (150 days to complain to the agency; 60 days for agency consideration; 60 days for EEOC efforts; 30 days to file suit) or 180 days, where there is no such agency (90 days to complain to EEOC; 60 days for EEOC efforts; 30 days to file suit).

The Proceedings Below

Petitioner Love, who was employed by respondent for more than 42 years, filed a written charge of racial discrimination with the Colorado Civil Rights Commission in 1963 (A. 34). He alleged that he was performing the duties of a conductor under the job title of porter-in-charge, an all-Negro classification, and that he had not been promoted to the higher paying position of conductor because it was restricted to whites (A. 2-4). Apparently, no action was taken by the Colorado Commission at that time. Petitioner Love renewed his complaint orally to the same office in 1965 (A. 37-38). By letter of July 30, 1965, the Colorado Commission advised him of the possibility of a position as a conductor, but without seniority, and offered to "pursue the case to an end" if he desired (A. 48). Mr. Love rejected this possibility because of the lack of job security which would result from loss of his seniority (A. 39-40).

[great] public importance" (Section 706(e), 42 U.S.C. 2000e-5(e), Br. App. A. pp. 34-35).

Mr. Love wrote to the Equal Employment Opportunity Commission on May 19, 1966, again alleging that he was being denied the higher pay and other benefits of a conductor because of his race.[4] The EEOC—following its standard practice of referring complaints initially filed with it to appropriate state agencies for consideration—informed the Colorado Commission that the charges were apparently within the latter's jurisdiction. On June 1, 1966, the Colorado Commission, by letter, declined to assume jurisdiction, specifically waived the 60-day requirement of Section 706(b) (Br. App. A, p. 33), and asked the EEOC to proceed (A. 8). EEOC then assumed jurisdiction of the complaint without further communication with Mr. Love. When the Commission began its investigation by interviewing Mr. Love, he signed, on July 23, 1966, a formal charge on the standard EEOC form (A. 10-11).

The Commission subsequently found reasonable cause to believe that there was a violation of the Act (A. 49-51). Its efforts at conciliation were not successful, however, and it advised Mr. Love on May 3, 1968, that he had 30 days within which to bring suit (A. 4). He filed suit on May 28, 1968 (A. 1).

The district court granted respondent's motion to dismiss (which it treated as a motion for summary judgment) on the ground that Mr. Love had allowed the statute of limitations to run, by not filing the complaint with the EEOC within 30 days of July 30, 1965, the date of the letter from the Colorado Com-

[4] The letter, dated May 19, 1966, and received May 23, 1966, is reprinted in Appendix B to this Brief, *infra*, p. 39.

mission to him (A. 12-14).[5] The court of appeals, Judge Fahy dissenting, affirmed, adding as a separate ground for the district court's lack of jurisdiction the complainant's failure to comply with the procedural requirements of Section 706 in connection with new proceedings purportedly initiated in May 1966 (A. 56-62).

Mr. Love moved for a rehearing and rehearing *en banc*. The United States and EEOC intervened in support of the motion. The petition for rehearing *en banc* was denied, and the petition for rehearing was referred to the original panel. It held that its original decision was erroneous insofar as it rested on the failure of Mr. Love to file the complaint with the EEOC within 30 days of the state commission's letter of July 30, 1965, since the discrimination there complained of took place prior to the effective date of Title VII (July 2, 1965) (A. 69). The court, however, reaffirmed its decision on the second ground, with Judge Fahy again dissenting (A. 71). Thus, the Court's ultimate conclusions were that Mr. Love's letter, received May 23, 1966, could not serve as a complaint to EEOC, because he had not complained first to the state commission of alleged discrimination subsequent to the effective date of Title VII, and that EEOC could not obtain jurisdiction over the complaint, under its referral policy, on or after June 1 when that commission declined jurisdiction, at least

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[5] The court also ruled that the issue of injunctive relief, although not the issue of back pay, was moot because petitioner Love had resigned from the company in November 1968 (A. 59).

in the absence of "further word or act by the complainant" (A. 70).[6] While the court did not discuss the formal charge filed by Mr. Love with EEOC on July 23, 1966, more than 30 days after the state commission had declined jurisdiction, it apparently considered his failure to file this charge within 30 days to be jurisdictional, even as to discrimination of a continuing character. The court thus held that petitioner Love's charges to the Commission were filed both too early and too late, and that neither of them was timely.

SUMMARY OF ARGUMENT

The Equal Employment Opportunity Commission sought, in this case, to accommodate two significant objectives of Title VII of the Civil Rights Act of 1964 by use of its referral policy. Title VII requires that non-federal agencies empowered to grant or seek relief from employment discrimination have an initial opportunity to remedy discrimination before action is taken by the Commission or the federal courts. But the statute also places the responsibility for securing ultimate compulsory compliance with Title VII guarantees—after non-federal agencies and the Commission have had the opportunity to obtain voluntary compliance—upon the individual by means of suits in the federal courts. By advising the Colorado agency of the complaint in this case, the Commission pro-

[6] The court stated that the EEOC's regulations at that time "did not contemplate or permit such a manipulation of the filing date," and that in any event such a filing procedure could not "be regularized by the adoption of regulations" (A. 70).

vided that agency with the first opportunity to remedy the alleged discrimination. At the same time, by automatically assuming jurisdiction of the complaint upon the state agency's termination of its consideration of the matter, the Commission made certain that petitioner Love retained his rights to its services and to bring federal court action.

In ruling that the Commission could not obtain jurisdiction over the complaint by this referral procedure and, hence, that the federal courts also lacked jurisdiction, the court of appeals, we submit, erroneously rejected the Commission's considered interpretation of the statute's procedural provisions and, instead, required inappropriately rigid adherence to complex timing requirements. Complaints frequently are filed initially with the Commission, but Title VII is silent on the manner in which it should deal with them. The statute does, however, empower the Commission to establish procedures to effect its purposes. The Commission, accordingly, has consistently employed its referral procedure in order to preserve the individual's right to federal protection of his Title VII rights, while fully honoring the right under the statute of non-federal agencies first to attempt to remedy employment discrimination.

In contrast to the Commission's approach, the court of appeals' formalistic ruling is not necessary to implement any policy of Title VII. To the contrary, it could very well discourage the intended beneficiaries of Title VII—who may believe EEOC is deliberately stalling by turning them away temporarily or who may be confused by the required procedures—from

persisting in seeking vindication of their rights. Nor is the decision below necessary to enable persons charged with discrimination properly to defend against the charge or otherwise to protect their valid interests. Indeed, respondent here, who was aware of petitioner Love's complaints of continuing discrimination at least by 1965, makes no contention that it was prejudiced.

The court's ruling essentially conflicts with the decision of the only other court of appeals which has considered the validity of the Commission's referral procedure, as well as with the approach of most federal courts to purely technical procedural irregularities in seeking relief under Title VII. Those courts have, like the Commission, generally applied a functional approach to the procedure under the statute, seeking to insure that its various policies are met rather than exalting procedural technicalities for their own sake. This approach is particularly appropriate under Title VII which is designed to enable lay working men and women, often unlettered and uncounselled, to secure critical rights against employment discrimination.

Moreover, even if it were assumed that the Commission's referral policy is invalid or was invalidly applied in this case, we believe that petitioner Love should nevertheless have been afforded his congressionally granted opportunity for judicial redress. He made good faith efforts to assert his Title VII rights and to have them judicially determined. In comparable situations in which individual complainants have inadventently failed to follow the strict letter of

Title VII's procedural complexities, the courts have ruled that their good faith efforts justify excusing those errors and affording them the full opportunity to invoke their rights, at least where there has been no prejudice to the responding party. This approach is especially appropriate here where, under the court of appeals' view, it is primarily the Commission's method of handling his complaint and not merely the complainant's own error which deprived him of a determination of his claim on the merits.

ARGUMENT

I. The Equal Employment Opportunity Commission Properly Exercised Jurisdiction of Petitioner Love's Complaints.

A. *The Commission's Referral Policy, Under Which It Asserted Jurisdiction, Validly Implements Congressional Objectives Of Providing State And Local Agencies An Initial Opportunity To Remedy Discrimination And Protecting The Individual's Right To Pursue Federal Remedies.*

The court of appeals ruled that the Commission could not obtain jurisdiction of petitioner Love's case by means of its referral policy. Under that policy, the Commission refers complaints filed initially with it to appropriate non-federal agencies and then assumes jurisdiction over them at the expiration of the statutory period during which these bodies have the exclusive opportunity to cure alleged discrimination. When the Commission begins its investigation of a complaint, usually by interviewing the charging party, it obtains a formal, sworn charge from him, as it

did here on July 23, 1966, if one has not already been filed. The court below also ruled that expiration of the 30-day time limit during which an individual must complain to the Commission after state or local proceedings have terminated barred EEOC from jurisdiction to entertain this formal complaint.

In thus rejecting the Commission's referral policy, the court of appeals adopted an unduly rigid approach to the procedural requirements of Title VII. The referral policy effectively implements two important goals of Title VII—providing state and local agencies with an initial opportunity to remedy discrimination and protecting the individual's right to pursue federal remedies, ultimately in court—without prejudicing defendants or interfering with any purpose of the statute.

1. The Commission's referral policy was developed in response to the recurrent problem of the treatment of complaints filed initially with it rather than the appropriate state or local agency.[7] Congress did not address itself to the problem of the disposition of such charges. It plainly desired that non-federal bodies

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[7] There are presently state fair employment agencies in at least 30 states, including California, New York, Ohio and Illinois. The Commission estimates that approximately 25 percent of all charges filed with it by complainants in those states have not been initially presented to the appropriate agency. Section 711, 42 U.S.C. 2000e-10, requires employers, employment agencies and labor organizations to post, in a conspicuous place, notices (which are prepared by the Commission) regarding filing of complaints. The notice (29 C.F.R. 1601.27) gives the address of the Commission and may prompt some individuals to complain initially to it.

have "primary, exclusive jurisdiction * * * for a sufficient period of time to let them work out their own problems at the local level." 110 Cong. Rec. 13087 (Senator Dirksen).[8] But Congress gave no indication—in the statute or in the legislative history—that it believed it was necessary or desirable that the individual personally present the charge to the appropriate state or local body.

The Commission, in exercise of its power to promulgate "suitable procedural regulations to carry out the provisions" of Title VII (Section 713(a), 42 U.S.C. 2000e-12(a)), has consistently referred premature charges to the appropriate non-federal agency. The pertinent Commission regulation which was in effect at the time of Mr. Love's complaints provided simply that it would "not accept the charge for filing, but shall assist the aggrieved person in complying with Section 706(b)" (Br. App. A, p. 38). In practice, the Commission implemented this regulation by referring charges to the appropriate state agency and, upon termination of their proceedings or after 60 days, us-

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[8] The original bill, which passed the House of Representatives, contained no provision comparable to Section 706(b) requiring first resort to state and local agencies. This requirement was first added in the Senate as one of the Dirksen-Mansfield amendments during a filibuster to attract enough votes for cloture. See, generally, Vass, *Title VII: Legislative History*, 7 B.C. Ind. & Comm. L. Rev. 431.

The original, as well as the final, bill did contain a provision authorizing the Commission to make agreements with state and local agencies, granting them exclusive jurisdiction where the Commission found their enforcement power to be adequate. Section 709(b), 42 U.S.C. 2000e-8(b). No such agreements have as yet been made.

ually—but not always—communicated with the charging party to determine whether he still wished to pursue his federal remedies. CCH *Employment Practices Guide*, ¶ 1254.15.

In 1968, the current regulation, which specifies the procedure in greater detail, was adopted. This regulation provides that the Commission will refer any charge filed initially with it to the appropriate state or local agency; that it will notify the complainant of this action; and that it will advise him that, unless it hears from him to the contrary, it will automatically assume jurisdiction of the complaint after 60 days have elapsed or upon termination of state proceedings, whichever occurs first (29 C.F.R. 1601.12, Br. App. A, pp. 34-38).[9]

2. The Commission's consistent practice of referring complaints filed initially with it to the appropriate non-federal agency satisfies the congressional policy that these agencies have the initial opportunity to resolve complaints. The court of appeals apparently believed that the referral procedure would, in some way, impair efforts by non-federal agencies (see A. 61), but there is no sound basis for believing that the

[9] Subsequent to the court of appeals' decision in this case, the Commission revised its practice (although not its regulation) regarding assumption of jurisdiction in order to afford further assurance that individuals will not lose their opportunity ultimately to seek judicial enforcement of their federal rights. Accordingly, pending resolution of the issue by this Court, the Commission now communicates with individuals who have complained initially to it, during the pertinent statutory period after referral to the appropriate non-federal agency, to confirm that they still wish the Commission to assert jurisdiction over their complaints.

efforts of non-federal agencies will be less vigorous or successful if complaints are referred to them by EEOC rather than filed initially with them by the individual.[10] And the record in this case does not suggest that efforts by the Colorado Commission were impaired by EEOC's referral.[11]

The referral procedure provides important protection to the individual's right to obtain judicial relief. The individual complainant's right of access to the courts is critical because the Act imposed upon him the burden of securing enforcement of Title VII by means of private lawsuit. See *Hutchings* v. *United States Industries*, 428 F. 2d 303 (C.A. 5); *Fekete* v. *U. S. Steel Corp.*, 424 F. 2d 331 (C.A. 3).[12]

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[10] Assumption of jurisdiction by the Commission, immediately subsequent to the expiration of 60 days, might, in some cases, afford state or local agencies a shorter period of exclusive jurisdiction because the complainant might not have filed immediately with EEOC at the end of the period. As a practical matter, however, the non-federal agencies usually have considerably longer than the minimum 60 days before federal efforts actually begin. And, of course, EEOC's assumption of jurisdiction does not prevent non-federal agencies from continuing their efforts.

[11] The Colorado Commission had twice previously received complaints from Mr. Love and twice failed to achieve a satisfactory resolution of the charge (see *supra*, p. 6).

[12] The history of revisions of Title VII during the course of congressional consideration of the Civil Rights Act of 1964 clearly indicates that Congress relied on private court action as the principal means of compelling compliance with the Act. Various versions of the bill consistently provided for means to compel compliance with Title VII in addition to procedures for conciliation of complaints. The original Senate version provided for a quasi-judicial board, comparable

The alternative to the referral procedure would be for the Commission, when a complaint is filed initially with it, to inform the individual that, in order to preserve his federal rights, he must first complain to the appropriate non-federal body and subsequently return to the Commission at the proper time—no earlier than 60 days from the time of complaint to the non-federal agency, (unless it earlier terminated jurisdiction), and no later than 30 days from notice of termination of that agency's proceedings or 210 days from the occurrence of the alleged discrimination (whichever is earlier). But this alternative would, in our view, be less likely to insure the individual of ultimate access to the courts. Some complainants, confused by the relatively complex procedural intricacies of Section 706, might fail to comply with such a requirement while others, feeling that the requirement of initial complaint elsewhere is simply the "run around," might abandon further attempts to secure their rights. See Note, *A Look at Love* v. *Pullman*, 37 U. Chi L. Rev. 181, 188. Both possibilities are especially serious because the intended beneficiaries of the Act are lay working men and women who are frequently unlettered or un-

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to the National Labor Relations Board, with power to issue broad remedial orders. The House version granted the Commission authority to institute civil suits in federal district court to compel compliance. The version which finally was passed placed the ultimate authority to compel compliance in the federal courts and reserved to the individual the main responsibility to initiate suits. See *Dewey* v. *Reynolds Metals Company*, No. 835, O.T. 1970, Brief for the United States as Amicus Curiae, p. 23 n. 9; Note, *Developments In The Law—Employment Discrimination And Title VII Of The Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1196-1197.

counselled and may in many cases have been the victims of indifferent governmental bureaucracies. A more active role by EEOC in assisting complainants is therefore desirable and appropriate to assure achievement of the congressional objective.

3. The referral procedure represents the considered judgment of the agency responsible for interpretation of the statute, which "is entitled to great deference." *Griggs* v. *Duke Power Co.*, No. 124, October Term, 1970, decided March 8, 1971, slip op. at 9; *Udall* v. *Tallman*, 380 U.S. 1. Indeed, we believe this principle applies with special force where, as here, an agency charged with the administration of a procedurally complex statute has, on the basis of its experience, accommodated its own procedures to the needs of the Act's intended beneficiaries in order to assure that form will not be exalted over substance in implementing the Act's policies.

The Commission's referral procedure has, accordingly, been approved by the only other court of appeals which has specifically considered its validity. *International Brotherhood of Electrical Workers, Local 5* v. *Equal Employment Opportunity Commission*, 398 F. 2d 248 (C.A. 3), certiorari denied, 393 U.S. 1021. See, also, *Marquez* v. *Sales Office, Ford Motor Co.*, 2 FEP Cases 26 (D. Neb.), affirmed, 3 FEP Cases 275 (C.A. 8); *Fix* v. *Swinerton and Walberg Co.*, 3 FEP Cases 9 (D. Colo.).[13] In *IBEW, Local 5*,

[13] In *Equal Employment Opportunity Commission* v. *Union Bank*, 408 F. 2d 867 (C.A. 9), the court ruled that the Commission had no jurisdiction over a complaint which the individual had not previously filed with the appropriate state

as in the present case, the complainant wrote initially to the Commission and it referred the complaint to the appropriate state agency. After the sixty-day deferral period, the Commission wrote the complainant inquiring whether he wished it to assert jurisdiction. He replied affirmatively. At that time, the state commission had not terminated its proceedings and 210 days had not passed since the date of the alleged discrimination. The state agency did terminate its jurisdiction a month later. When EEOC subsequently commenced its investigation—more than a year from the date of the alleged discrimination—the complainant finally swore a formal charge.[14] In upholding the Commission's action, the court held that the initial letter to the Commission "was not * * * a valid charge when received * * * for it had not been sent to * * * [the state commission] and the required 60 days had not passed." 398 F. 2d at 252. But it ruled that "when * * * [complainant's] answer to EEOC's letter * * * was

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agency. The state agency in that case, however, had no opportunity to consider the charge for the Commission did not refer it. Accordingly, the issue of the validity of the Commission's referral procedure was not before the court.

[14] The exact timing in *IBEW, Local 5* was: discrimination (July 21, 1965); letter to EEOC (August 12, 1965); referral to state commission (September 3, 1965); letter from EEOC to complainant inquiring whether he still desired it to assume jurisdiction (December 16, 1965); reply by complainant authorizing assumption of jurisdiction (December 27, 1965); advice by the state agency to complainant that it had terminated its jurisdiction (January 28, 1966); formal charge filed (August 17, 1966). 398 F. 2d at 249-250. When the formal charge was filed, an attempt was made to serve it personally on the Union. A copy of the charge was received by mail on December 14, 1966. *Id.* at 250.

received * * * [the] charge * * * became an effective charge as of" the date of receipt, which was "within the two hundred and ten day limit." *Ibid.*

The court below distinguished the present case from *IBEW, Local 5* on the ground that the court there "found a subsequent charge filed within the statutory time intervals and sequence was valid" (A. 60-61).[15] It is not clear from the court's opinions in the present case whether it intended to suggest that it would hold the referral procedure valid if, during the pertinent time period, EEOC obtained a reauthorization from the complainant to proceed (see A. 70). If that limited ruling is, in fact, the basis of the court's decision, it truly is a meaningless "exaltation of form over substance." Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1214.

Formal reauthorizations from complainants within the designated time period are without practical significance. With or without this additional step, Commission proceedings would follow essentially the same pattern. When the Commission reaches a case, it typically interviews the complainant as the first step

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[15] In the present case, the formal complaint of July 23 was filed within the 210-day period from the act of discrimination (which was continuing and, for purposes of timing, extended through May 22). Section 706(d) requires filing a charge with EEOC within 210 days of the alleged discrimination or within 30 days of notice that state proceedings have been terminated. The court of appeals ruled that the 30-day period from termination of state proceedings was the relevant time period in this case even though petitioner Love evidently had not, himself, received such notice. EEOC, of course, did receive such notice.

in its investigation. If, at that time, interim developments have made Commission efforts no longer desired or necessary, proceedings can then be terminated. The party charged with discrimination ordinarily is not served with a copy of the complaint to the Commission until after that interview.[16] In the present case, respondent, who was, of course, aware of petitioner Love's earlier charges of racial discrimination, was served with a copy of the formal complaint on July 27, 1966 (A. 54), four days after it was sworn. Moreover, further inquiry of the complainant after the State had terminated its proceedings here would have been a senseless formality. His letter of charges to the Commission had been received on May 23, 1966, only eight days before it assumed jurisdiction, in response to the State's waiver, on June 1, 1966.

A requirement that the Commission obtain a reauthorization will not, moreover, simply add a useless piece of paper to its file. It may very well cause the complainant to lose his opportunity for EEOC conciliation and subsequent court action, either as a

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[16] Although a regulation of the Commission which became effective on July 29, 1966 (after the present complaint was served) provides for service of the charge upon its filing (29 C.F.R. 1601.13), the Commission's practice, until it is able to eliminate its sizeable backlog, has been not to serve the alleged discriminator with a copy of the charge until it actually begins its investigation because it fears that reprisals against the charging party may occur between the time of his complaint and the time the Commission begins active proceedings. See *IBEW, Local 5, supra,* p. 19. Of course, no issue with respect to service of the charge has at any time been raised by the respondent in the present case.

result of failure on his part to reply to a letter from EEOC in time or because the Commission inadvertently failed to send a request at the proper time. An individual's access to forums designated for the vindication of significant federal rights should not be denied as a result of such harmless oversights or accidents.

B. *The Commission's Exercise Of Jurisdiction Was Consistent With The Practical Approach Which The Commission And Most Federal Courts Have Adopted in Interpreting The Time Requirements Of Title VII.*

The Commission and the lower federal courts have generally sought, in interpreting the timing and other provisions of Title VII, to insure that the basic goals of the statute are met. They have refused to apply the procedural provisions with undue rigidity at the expense of those goals. The departure by the court below from this practical approach was, in our view, unwarranted.

The statute encourages efforts, primarily by EEOC and comparable non-federal agencies, to achieve voluntary compliance with the requirements of Title VII. It therefore requires that those bodies be given the opportunity, before judicial proceedings are begun, to attempt to settle disputes. The statute also affords the individual complainant an opportunity to seek prompt enforcement of his rights in the federal courts. Accordingly, it requires the individual to refrain from filing suit for only a comparatively short period during which efforts at conciliation may take place.

Strict adherence to the time schedule of the statute would in many instances impair, rather than promote, meaningful accommodation between voluntary and compulsory means of securing Title VII guarantees. Rigid enforcement of the various time limits might, for example, require the individual to complain to EEOC or to file suit even though it appears that preliminary voluntary efforts are likely to be successful and render further action unnecessary. And, of greater importance, such a mechanistic approach might deprive individuals, who are actively seeking redress of their grievances in good faith, of their opportunity for judicial relief because of technical irregularities which do not impair the ability of the party charged with discrimination to respond to the charge (but see Point II, *infra*).

A functional approach, on the one hand, permits the process to take an orderly and natural course, in keeping with the statutory policies. For example, the Commission has interpreted Section 706(e), providing for notice to a complainant of his right to sue if it has not obtained voluntary compliance within 60 days from the filing of a charge, to permit continuation of conciliation beyond this time without depriving the individual of his right to sue. The conciliation process often is not complete by the end of 60 days. If, at this time, the Commission must issue the notice of right to sue to the complainant, who, in turn, must institute any judicial action within 30 days, efforts at achieving voluntary compliance may be thwarted. Accordingly, the Commission has followed the practice, which the courts of appeals have

uniformly approved, of issuing the notice only at termination of its efforts with respect to the charge, unless the complainant specifically requests its issuance sooner. *Cunningham* v. *Litton Industries*, 413 F. 2d 887 (C.A. 9); see *Miller* v. *International Paper Co.*, 408 F. 2d 283 (C.A. 5); *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357 (C.A. 7).

The same attitude is reflected in cases suspending the running of the statutory period of limitations for initial complaint to the Commission in the situation where an individual has sought arbitration of his grievance under a collective bargaining agreement. *Culpepper* v. *Reynolds Metals*, 421 F. 2d 888 (C.A. 5); *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303 (C.A. 5). Congress made no reference to the effect of the individual's pursuit of arbitration on Title VII remedies.[17] The court in *Culpepper* ruled that the congressional purpose of encouraging efforts at non-judicial settlement of claims of discrimination is better served by suspending the statute upon the individual's "constructive effort" to obtain private relief by arbitration than by forcing him to file a complaint with the Commission or institute court action before arbitration is completed. The court relied upon *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, in which this Court held that the statute of limitations under the Federal Employers Liability Act was

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[17] Cf. *Dewey* v. *Reynolds Metals Co.*, No. 835, October Term, 1970, in which one of the issues is whether an individual may pursue his rights under the collective bargaining agreement by grievance-arbitration proceedings, as well as his rights under Title VII by proceedings in the federal courts, or whether he must elect between these rights.

tolled by the timely filing of an action in state court which subsequently was dismissed for improper venue. The *Culpepper* court stressed the same essential considerations which this Court emphasized in *Burnett*—that in applying "humane and remedial" legislation the interest in vindicating plaintiffs' rights frequently outweighs the policy of repose embodied in statutes of limitations (380 U.S. at 427; 421 F. 2d at 892) and that the complainant had not slept on his rights but had diligently sought relief and had provided timely notice of his claim to the defendant (380 U.S. at 429; 421 F. 2d at 891).[18]

The ruling of the court of appeals in the present case, by contrast, needlessly frustrates the basic statutory objective of affording the individual the ultimate opportunity to have the federal agency and the federal courts determine the validity of his claim that his federal rights were violated. The functional approach of the Commission protected this right without depriving non-federal agencies of their opportu-

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[18] Two district courts recently have ruled similarly that the Commission is not barred from considering complaints filed with it within 210 days from the date of discrimination in states with fair employment practice commissions. In these cases, complaints had not been filed with the appropriate state agency within 150 days of the discrimination. At the expiration of 210 days, the agencies had not yet terminated their proceedings or had jurisdiction of the case for 60 days. However, the Commission, under its regulations (29 C.F.R. 1601.12), accepted complaints for filing before the expiration of 210 days in order to preserve the individual's right of access to federal forums for the protection of his Title VII rights. See *Vigil* v. *American Tel. & Tel. Co.*, 305 F. Supp. 44 (D. Col.); *Anderson* v. *Methodist-Evangelical Hospital, Inc.*, 63 LC (CCH Transfer Binder) ¶ 9525 (W.D. Ky.).

nity to remedy discrimination or prejudicing the defendant. The court below, therefore, should have approved the Commission's exercise of jurisdiction over the complaint, either by permitting it to treat petitioner Love's initial letter of charges to the Commission as having been filed when the Colorado Civil Rights Commission subsequently declined jurisdiction or by treating the 30-day period as tolled to permit the filing of the subsequent complaint. See *Foman* v. *Davis*, 371 U.S. 178 (rejecting an unduly technical approach to the question of timeliness of notices of appeal under the Federal Rules of Civil Procedure).

II. An Individual Who Has Sought In Good Faith To Invoke His Title VII Rights Should Not Be Deprived Of Judicial Redress Because Of Technical Procedural Defects In Proceedings Prior To Suit.

Our fundamental position is that the Commission's referral procedure is a wise and proper exercise of its power to adopt regulations for the implementation of Title VII. But even if that procedure—as presently embodied in the regulation or as applied in this case—is not valid, we believe that complainants who have made reasonable efforts to invoke their Title VII rights should not be barred, as a result of application of the Commission's allegedly erroneous procedure, from the opportunity to seek enforcement of those rights in the federal courts.

The federal courts have repeatedly recognized the significance of the individual's right under Title VII to judicial enforcement of his federal rights. They have, for example, ruled consistently that the complainant may institute suit after his complaint has

been before the Commission for the required 60 days even if the Commission has not yet considered the complaint.[19] Similarly, the courts have ruled that the individual may sue even if the Commission has, after investigation of his complaint, determined that, in its view, no violation of Title VII has occurred.[20]

The courts have also recognized that a tolerant attitude toward procedural errors is particularly appropriate because of the nature of the intended beneficiaries of Title VII. As Judge Fahy, dissenting below, pointed out (quoting *Antonopulos* v. *Aerojet-General Corp.*, 295 F. Supp. 1390, 1395 (E.D. Calif.)) (A. 65):

> We are not dealing with businessmen plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class, who are generally without substantial higher education, dot every "i" and cross every "t" on their way to the courthouse.

Accordingly, the courts, in a variety of situations involving alleged defects in complying with the procedural requirements of Title VII, have "been ex-

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[19] See *Dent* v. *St. Louis-S.F. Ry.*, 406 F. 2d 399 (C.A. 5); *Johnson* v. *Seaboard Air Line R.R.*, 405 F. 2d 645, (C.A. 4), certiorari denied, 394 U.S. 918; *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357 (C.A. 7).

[20] See *Fekete* v. *U.S. Steel Corp.*, 424 F. 2d 331 (C.A. 3); *Flowers* v. *Local No. 6, Laborers Int'l U. of North America*, 431 F. 2d 205 (C.A. 7); *Beverly* v. *Lone Star Lead Constr. Corp.*, 3 FEP Cases 74 (C.A. 5, No. 29,620, January 19, 1971).

tremely reluctant to allow procedural technicalities to bar claims brought under the Act." *Sanchez* v. *Standard Brands*, 431 F. 2d 455, 460 (C.A. 5). Thus, in addition to upholding the Commission's functional approach to the statute's timing requirements for filing charges of discrimination, they have applied a liberal approach to the pleadings themselves. The courts have held that failure to have the initial letter of complaint notarized does not bar suit even though the notarized charge is not filed until after the time limits have expired;[21] that if some charging parties have filed charges with EEOC, it is not necessary for other members of the same class to do so in order to obtain relief;[22] and that an incomplete or erroneous statement of charges filed with EEOC does not bar a later amendment.[23]

These cases have a common rationale. Where the complainant has made reasonable efforts, in good

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[21] *Choate* v. *Caterpiller Tractor Co.*, 402 F. 2d 357 (C.A. 7); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (C.A. 5).

[22] *Oatis* v. *Crown Zellerback*, 398 F. 2d 496 (C.A. 5).

[23] *Sanchez* v. *Standard Brands, Inc.*, 431 F. 2d 455 (C.A. 5); *Georgia Power Co.* v. *Equal Employment Opportunity Commission*, 412 F. 2d 462 (C.A. 5). The Commission's regulation on the contents of charges (29 C.F.R. 1601.11(b)) similarly provides that "a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments relate back to the original filing date."

faith, to secure protection of his federal rights by the federal bodies responsible for protecting them and the defendant has not been prejudiced, the complainant should not be denied the opportunity for a determination of his charge on the merits because of procedural defects. See, also, *Burnett* v. *New York Central R. Co.*, 380 U.S. 424; *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (C.A. 5). This rationale plainly is applicable to this case. Petitioner Love made reasonable efforts to invoke the aid of the Commission and respondent's defense was not prejudiced. Indeed, it was the action of the Commission and not that of complainant which, under the court of appeals' ruling, deprived the complainant of his opportunity to invoke federal remedies. Had the Commission at some point advised Mr. Love that it could not process his charge until he had formally complained to the state commission, there is no reason to believe, in view of his past persistent efforts to obtain redress, that he would not have done so. Cf. *Crosslin* v. *Mountain States Tel. & Tel.*, No. 326, October Term, 1970, decided January 18, 1971.[24] The good faith error (if it was error)

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[24] *Crosslin* involved the Commission's practice of refusing to refer charges filed with it to certain state agencies whose enforcement powers it considered inadequate. The court of appeals ruled that the federal courts were without jurisdiction to consider petitioner's claim of racial discrimination because it had not been presented to the state agency. We took the position, in an *amicus* brief filed at the invitation of the Court, that petitioner should not be deprived of her opportunity for judicial relief by application of the Commission's policy. We suggested that the Court grant the petition for a writ of certiorari and order the case remanded to the district court with instructions to retain jurisdiction for a sufficient

of the Commission in applying its consistent procedural policy, no less than good faith non-prejudicial procedural mistakes of Title VII complainants, should not bar ultimate determination in the federal courts of the substantive merits of complaints of illegal employment discrimination.

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time to permit petitioner to institute appropriate state proceedings. *Brief For The United States As Amicus Curiae,* pp. 8-9. The Court granted the petition, vacated the judgment, and ordered the case remanded to the district court "for reconsideration in light of the suggestions contained" in our brief.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and remanded for further proceedings in the district court.

Respectfully submitted.

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APPENDIX A

STATUTORY PROVISIONS AND REGULATIONS

Section 706 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, provides:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commsision where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and conviction thereof shall be fined not

more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment pracitce alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect

thereto upon receiving notice thereof. the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission

shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

Section 713(a), 42 U.S.C. 2000e-12(a), provides:

> The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

The present regulation of the Equal Employment Opportunity Commission regarding referrals, 29 C.F.R. 1601.12, provides:

(a) In order to give full weight to the policy of section 706(b) of the Act which affords State and local fair employment practice agencies that fall within the provisions of that section an opportunity to resolve disputes involving alleged discrimination concurrently regulated by Title VII of the Civil Rights Act of 1964 and State or local law, the Equal Employment Opportunity Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to the State or local agency. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to the State or local agency as is permitted by law and is practicable. It is the experience of the Commission that because of the complexities of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of protection of the Act. Accordingly, it is the intent of the Commission to simplify filing procedures for parties in deferral States and localities, and thereby avoid the accidental forfeiture of important Federal rights.

(b) The following procedures shall be followed with respect to cases arising in the localities to which the Commission defers:

(1) Any document, whether or not verified, filed at any field office of the Equal Employment Opportunity Commission or at Washington, D.C.,

which may constitute a charge cognizable under Title VII, shall be deferred to the appropriate State or local agency pursuant to the procedures set forth below.

(i) All such documents shall be date and time stamped on receipt.

(ii) A copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate State or local agency.

(iii) The aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the State or local agency pursuant to the provisions of section 706(b), and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case. Where the State or local agency terminates its proceedings within 60 days of the date of receipt of the document without notification to the Commission of such action, the date on which the aggrieved party is notified of the termination of the State or local action shall be deemed to be the date that the document was filed as a charge with the Commission.

(iv) The sixty-day period shall be deemed to have commenced on the receipt of the document by the State or local agency as evidenced by the date indicated on the return receipt. On notification of termination of State proceedings or the expiration of 60 days, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case.

(v) In cases where the document is filed with the Commission more than 150 days following the alleged act of discrimination but less than 210 days therefrom, the case shall be deferred pursuant to procedures set forth above: *Provided, however*, That unless the Commission is earlier notified of the termination of the State or local proceeding, the Commission will consider the charge to be filed with the Commission on the 209th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceeding prior to the 209th day following the alleged acts of discrimination, without notification to the Commission of such action, the date on which the aggrieved party is notified of the termination of the State or local action shall be deemed to be the date that the document was filed as a charge with the Commission.

The regulation in effect at the time the charge in this case was lodged with the Equal Employment Opportunity Commission (30 Fed. Reg. 8408) provided:

> In any instance in which an aggrieved person seeks to file a charge and it appears from the charge or from other information that the aggrieved person has not begun proceedings before a State or local authority pursuant to section 706(b) of Title VII, the Commission may not accept the charge for filing, but shall assist the aggrieved person in complying with Section 706 (b).

APPENDIX B

May 19, 1966

Equal Employment Opportunity
Commission
Washington, D. C. 20506

[Received May 23, 1966]

Attn: Mr. George L. Holland

Hentlemen: (sic)

This is a letter of inquiry to determine whether the circumstances I feel unfair and discriminatory are of such a nature as to come under your area of inquiry. I have taken the matter up with the state Civil Rights Commission locally and find that my objective was not understood. I am enclosing their letter of reply. According to it, they evidently believed I was endeavoring to become a Pullman Conductor. That is not the case.

I have been a sleeping-car porter for 40 years, and an "in-charge" porter for 20 of those years. My complaint is simply this: That when I am on duty as an "in-charge" porter I have all the duties and responsibilities of a Pullman conductor, and receive only porter pay.

I maintain that this is discrimination because of race, and I believe that it is a matter which comes under the jurisdiction of your office. If there is further information which you require I will be pleased to give it to you.

Very truly yours,

/s/ Earl A. Love
EARL A. LOVE
1511 East 29th Ave.
Denver, Colo. 80205

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Supreme Court, U.S.
AUG 2 1971

IN THE

Supreme Court of the United States

Nos. 70-5033 and 7[redacted]

EARL A. LOVE, *Petitioner,*
and
UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
and
THE UNITED STATES OF AMERICA, *Intervenors,*
v.
THE PULLMAN COMPANY, *Respondent.*

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners,*
v.
THE PULLMAN COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ANSWER BRIEF FOR THE RESPONDENT

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August 1971

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IN THE

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EARL A. LOVE, *Petitioner,*
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THE PULLMAN COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ANSWER BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

INTRODUCTION

Section 706(b), Title VII, of the Civil Rights Act of 1964 provides that "no charge" of discrimination "may be filed" with the United States Equal Employment Opportunity Commission (EEOC) until it has first been filed with the state agency empowered to seek relief from employment discrimination, if one exists, and until 60 days have expired

or the state agency has terminated its proceedings, whichever is earlier.[1] In addition thereto, Section 706(d) requires that the charge be filed with the EEOC within the earlier of the following time periods: (1) 30 days of receipt of notice that state proceedings have been terminated, or (2) 210 days after the alleged unlawful employment practice occurred.[2]

QUESTIONS FOR DETERMINATION

Was the District Court without jurisdiction to entertain Love's suit because Love made his charge directly before the EEOC instead of filing it with the state as required by Section 706(b)? Did the act permit EEOC to orally advise the state that a charge had been filed with it; then assume jurisdiction to process the charge by manipulating the filing date when no further authorization was either sought or received from Love during the 30-day period prescribed by Section 706(d)?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964 and the Regulations of the Equal Employment Opportunity Commission are set forth in Appendix A of this brief (Br. App. A) *infra*, pp.

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[1] The EEOC's general counsel has determined that the Colorado statute (CRS 1963 80-21-1 et seq.) constitutes the type of fair employment practices law which the Congress anticipated when it passed Section 706(b). See G.C. Interpretative Opinion numbered 667-65; LRX 1892e.

[2] Since the petitioner's position is apparently predicated upon the so-called waiver letter of Mr. Reynolds, dated June 1, 1966 (App. 8) as constituting the termination by the state, the 210-day period could not seem to be an issue in this case.

STATEMENT OF THE CASE

FACTS

Earl Love is a black man, formerly employed by The Pullman Company for many years as a porter, and who for several years of his employment had been a "porter-in-charge." (A. 52) In May of 1963, prior to the effective date of Title VII of the Civil Rights Act of 1964 (it became effective July 2, 1965) Love and others filed a written complaint with the Colorado Civil Rights Commission claiming racial discrimination as prohibited by the Colorado Antidiscrimination Act of 1957 (Chap. 80, Art. 21, Sec. 1, et seq. 1963 CRS) existed at the place of his employment, and that The Pullman Company had been discriminating between its porters-in-charge and Pullman conductors on account of their race. Although the record is not clear as to the disposition of this complaint, it appears that the Colorado Civil Rights Commission concluded the charge was not warranted and did not pursue it. (A. 39)

In the summer of 1965 Love returned to the State Civil Rights Commission and orally reiterated the same complaint. (A. 36) Thereupon the Commission's State Director took the matter up with The Pullman Company representative in Denver and was informed that Love would be promoted to conductor at his request, but that he would thereby lose his seniority under the existing labor agreements, go to the bottom of the conductor's seniority list, and likely be without a job. This information was communicated by the Director to the Colorado Civil Rights Commission and by letter dated July 30, 1965 to Love the Director advised Love (the Commission itself had determined to take no action) that the Director would pursue the case to an end if Love was so inclined. (A. 48) Thus, even though he was offered the further services of the State Civil Rights machinery on June 30, 1965, Love lost all interest in further state action, and there were no further contacts between Love and the State Commission subsequent to July 30, 1965.

Although it was not a part of the record in the District Court and not considered by it, the Petitioners have produced as an appendix to their respective briefs herein, a letter written by Love to it dated May 19, 1966, which they now contend is the charge upon which this action was initiated.[3] The trial court, although it did not have the letter of May 19, 1966 before it, determined from the evidence that Love had first visited the EEOC in May of 1966.[4] (A. 14)

Although required by the administrative interpretation of Section 706(b) of the Act in force at the time (LRX 1892e) and contrary to the terms of the regulation then in force (30 Fed. Reg. 8407) the charge was not sent to the State Commission for exercise of exclusive jurisdiction for the 60 day period, but rather filed when received by EEOC on May 23, 1966. However, in some manner, not entirely clear from the record, it appears the State Commission was orally advised by the EEOC that a charge had been filed with it for on June 1, 1966 (A-8) the State Commission advised EEOC that Love had been to the State Commission, lacked confidence in it, did not file a complaint with it, and accordingly would waive the sixty-day deferment period and suggested that EEOC proceed to give Love relief. (A-8)

No further action or affirmative steps were taken by the EEOC, Love or The State Commission until July 23, 1966, when a formal charge was sworn by to Love and filed with EEOC (A. 9-11).

The EEOC then proceeded to investigate the charge and their "Final Investigative Report" (A. 52-55) concluded that The Pullman Company was not in violation of Title VII of the Civil Rights Act of 1964 as far as wage discrimina-

---

[3]Love Br. App. Ex. 1, p. 1a; USA & EEOC Br. App. B, p. 39.

[4]The EEOC "Decision" finding probable cause and EEOC "Final Investigative Report" which were before the trial court reflect the charge was filed May 23, 1966 (A. 49, 52).

tion was concerned; that porters-in-charge do not have the same responsibilities as Pullman conductors; and recommended the Commission find that there was no probable cause to believe that the charge made by Love was true. The investigative report did recommend, however, that the Commission consider the issuance of a Commissioner's charge against The Pullman Company and the Brotherhood of Sleeping Car Porters Union probably because the collective bargaining agreement which existed between the two limited the advancement of negroes to conductor positions. (A. 55)

The Commission, however, chose to disregard the Investigator's Report which had also been approved by the Commission's Regional Director (A. 55) and, on the other hand, found probable cause for believing that Love was the victim of prohibited discrimination as charged by Love.[5] This determination was not made until January 24, 1968 (A. 49-51). Love then filed his complaint in the District Court on May 28, 1968 (A. 1) and by an amended complaint filed November 4, 1968 sought to also convert it into a class action. (A. 2-5)

On November 17, 1968, Love voluntarily resigned his position with The Pullman Company. (A. 14) Effective on January 1, 1969 the railroads took over the sleeping car operations of The Pullman Company and The Pullman Company no longer employed porters, porters-in-charge or conductors.

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[5]The EEOC found that porters and porters-in-charge were an all negro classification and conductors are traditionally all white. It noted that porters are represented by the Brotherhood of Sleeping Car Porters, which had a labor agreement with The Pullman Company, and that conductors are represented by the Brotherhood of Railroad Trainmen. (A. 49-50)

PROCEEDINGS BELOW

A. District Court

The Pullman Company moved to dismiss Love's amended complaint on the grounds that the Court lacked jurisdiction over the subject matter because the plaintiff failed to comply with the sequence of filing requirements set forth by Section 706(b) of the Act and the timeliness requirement set forth by Section 706(d) of the Act.

The trial court held that Love had to exhaust his remedies through the state machinery before the EEOC and the District Court had jurisdiction over the subject matter. It held the state had terminated its proceedings on July 30, 1965, and that since Love had not filed with the EEOC until May 23, 1966, the charge had not been filed in apt time, namely, within 30 days after the state had terminated its proceeding and therefore, both the EEOC and the court lacked jurisdiction over the subject matter. The Court dismissed the complaint.

B. Court of Appeals

(1) *Original Opinion*

The EEOC filed an amicus curiae brief and along with Love argued that the letter of May 19, 1966, started a new chain of events. They reason that they orally advised the Colorado Civil Rights Commission of the filing of this, a new charge, and that within the statutory 60-day period thereafter the Colorado Commission had waived its exclusive jurisdiction. They urged, in effect, that they could hold the charge (the letter of May 19, 1966) in suspense, advise the state of its filing and automatically assume jurisdiction at the end of the deferral period without further authorization from the complainant.

The Court of Appeals held that the device used by the EEOC to start a new time sequence was ineffective for the letter had to be filed when received and could not be held

in suspense which would permit them to manipulate the filing date. The majority of the judges agreed that the charge had been filed on the date received, and at that time the EEOC had no jurisdiction since the complaint had not yet been presented to the Colorado Commission as required by the statute. In so doing they noted the existence of an EEOC regulation stating that ". . . a charge is deemed filed when the Commission receives from the person aggrieved a written statement . . . ." (A. 60)

The majority ruled the complainant had to proceed before the state agency before a charge could be filed with the EEOC and that the filing with EEOC had to be within 30 days after the state had terminated its action. They also held the time periods applied irrespective of whether there were isolated incidents of discrimination or a continuing violation.

(2) *On Rehearing*

The EEOC sought and obtained permission to intervene in the Court of Appeals on rehearing and for the first time argued that since Title VII of the 1964 Act did not become effective until July 2, 1965, that the letter sent Love by the State Commission on July 30, 1965 had to be disregarded. They claimed it could only have application to events occurring before the effective date of the Act and therefore did not start the statutory 30 day period to run. The majority of the judges agreed and reasoned that the State Commission's termination of July 30, 1965 had to be of proceedings relating to events occurring before the effective date of the Act, which events were not within the jurisdiction of the EEOC, but held that the EEOC could not suspend the charge received May 23, 1966, and merely advise the Colorado Commission that a charge had been filed. The majority further refused to permit the EEOC to withhold filings and automatically take, postpone, or resume jurisdiction at its pleasure. The Court of Appeals then affirmed the judgment pointing out that the manipulated

procedures reflected in the record could well, under different facts, penalize compliance as well as reward noncompliance with the requirements of the Act.

SUMMARY OF THE ARGUMENT

Under the express provisions of Title VII of the Civil Rights Act of 1964 Mr. Love was required to:

1. First commence a proceeding before the Colorado Civil Rights Commission in accordance with Section 706(b) of the Act, and

2. Then file his charge with the EEOC within 30 days after the state had terminated its proceedings in accordance with Section 706(d) of the Act.

These prerequisites are precise and unambiguous and must be complied with before the Federal Courts (or the EEOC) have jurisdiction over the matter. It is the contention of The Pullman Company that neither Mr. Love, nor anyone acting on his behalf, complied with either of the above mandates of Congress.

The Pullman Company is hardly unmindful of the fact that Title VII of the Civil Rights Act of 1964 is remedial in nature. Nevertheless, we must not lose sight of the fact that to accomplish its remedial purposes it is vital to stay within the limitations imposed by Congress.

It is well accepted, and not contested by the petitioners here, that prior utilization of the state machinery is a mandatory prerequisite for jurisdiction over the subject matter. Indeed, the regulation of the EEOC in force at the time of the operative facts here recognized that the EEOC could not validly accept a charge for filing if the charging party had not commenced a proceeding before the state Civil Rights Commission. 30 Fed. Reg. 8407, Br. App. A, p. . Similarly, in almost contemporaneous rulings and opinions (LRX 1892e) the EEOC stated that where a charge is filed with the EEOC alleging a discriminatory act in a state to which the EEOC is required to defer, the EEOC will do two things:

1. Refer the charge to the appropriate state agency, and

2. After the deferment period has elapsed, inquire whether the charging party wishes it to "assert jurisdiction" and then will proceed only upon the affirmative request of the charging party.

In other words, EEOC, consistent with the decision below, did not consider that it had jurisdiction over prematurely filed complaints, nor could it automatically assert jurisdiction over such prematurely filed charges until it had received affirmative directions from the charging party after the deferment period had expired. Patently these steps were not followed in the case of Mr. Love.[6]

Strangely enough, petitioners seem to ignore these constructions placed upon the Act by EEOC at the time. Instead reliance is apparently placed upon the amendment to Regulation 1601.12[7] to validate the method by which Mr. Love's charge was handled, and to give sanction to the use of an "oral advise method" in lieu of filing a written charge to commence proceedings before the state so as to comply with Section 706(b); and to give sanction to the manipulation of the filing date with the EEOC from May 23, 1966 to sometime after June 1, 1966, so as to comply with Section 706(d). This cannot be done, for such procedural steps as were taken in the instant case are not even sanctions by the 1968 regulation; (therefore, it is questionable whether the validity of the same is ripe for determination by this court); were not in accordance with the decisions and regulations of the EEOC in force at the time; and, of most importance, are not sanctioned by the Act itself.

---

[6]The charge was filed by the EEOC before the state was advised of it; the charge itself never was referred to the Colorado Civil Rights Commission (the state merely being advised that a charge had been filed); no word of any kind was communicated to or received by Mr. Love following the "termination letter" of June 1, 1966 until July 23, 1966—a period of time in excess of that allowed by the Act.

[7]29 CFR 1601.12 adopted in November of 1968 and set forth in Appendix A to this brief at page

Our basic quarrel is not with the EEOC's referral policies, be it by regulation or otherwise, as a proper referral or prematurely filed complaints frankly may be quite laudable. Our quarrel is with the method in which Mr. Love's case was handled. The burden of complying with the mandates of Congress does not rest solely or even initially with the EEOC—Mr. Love had some, if not the ultimate, responsibility in this regard.

Regardless of upon whom the burden of compliance rests, difficulty, if the same in fact does exist, in following the procedures set forth by Congress does not excuse noncompliance, for Congress, after long debate and for well considered reasons, created a new right, and prescribed the means of asserting it. The method used to assist an aggrieved party under the Act, be it by regulation or otherwise, cannot circumvent the mandate of Congress, nor can the agency itself manipulate the procedure as was attempted here. As stated by Chief Judge Lewis in his concurring opinion on rehearing:

> "... admittedly those persons seeking relief under the Act are usually uninformed as to procedural necessities, often present their problem in letter form, and directly to the Commission, and so need regulatory or legislative protection to preserve their basic rights against unnecessary procedural bars. But this problem is not unique with this Commission and its solution certainly does not lie in the approval of the manipulated procedures reflected in this record. To do so, might well, under different facts, penalize compliance as well as reward noncompliance with the requirements of the Act." (A. 71)

The result reached by the court below based upon the facts in this case was not "formalistic" as urged by the petitioners. Indeed, it was the only result the court could reach on the facts of Mr. Love's case and be consistent with the clear language of Congress.

ARGUMENT

I. INTRODUCTION

Basically two propositions must be kept in mind. First, is the Congressional mandate of Section 706(b) that an individual in Mr. Love's situation must first "commence a proceeding" before the state body prior to the EEOC's having jurisdiction over the matter.[8] Secondly, even if a proceeding is properly commenced before the state body, Section 706(d) of the Act is quite clear that Mr. Love has only 30 days within which to invoke the jurisdiction of the EEOC after the state has terminated its proceeding.[9]

The simple fact is that the procedures used purportedly to comply with these mandates in the case of Mr. Love were not those as prescribed by the Act. The deferral regulation and policy [even if valid] urged by petitioners as a sanction as to what actually occurred, has no application to this case because it was not followed.

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[8]Section 706(b) provides in pertinent part as follows: "In the case of an alleged unlawful employment practice occurring in a state . . . which has a state or local law prohibiting the unlawful employment practice alleged . . . no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of 60 days after proceedings have been commenced under the state or local law, unless proceedings have been earlier terminated . . ."

[9]Section 706(d) requires that an aggrieved party file his charge with the EEOC ". . . within 210 days after the alleged unlawful employment practice occurred or within 30 days after receiving notice that the state or local agency has terminated its proceeding under state or local law whichever is earlier . . ."

II. THE ADMINISTRATIVE INTERPRETATION IN FORCE AT THE TIME RECOGNIZED THE LACK OF JURISDICTION UNDER THE INSTANT FACTS. THE REGULATION OR POLICY OF THE EEOC URGED TO BE CONTROLLING (adopted 2½ years after the operative facts) HAS NO APPLICATION BECAUSE IT IN FACT WAS NOT FOLLOWED.

The petitioners urge that the "oral advise" method of commencing a state proceeding and the manipulation of filing dates of charges filed with the EEOC are condoned by the deferral regulations and policies of the EEOC and sanctioned by the Act. We do not agree. This method is not sanctioned by any regulation promulgated by the EEOC of which we are aware, nor are such procedures recognized anywhere in Title VII.

On the contrary, at the time Love's charge was filed, counsel for the EEOC had written opinions and the EEOC itself had conceded in a decision that it had no jurisdiction until the charge had been first filed with the State Commission;[10] and further concluded that the complainant must file his charge with the EEOC within 30 days after the conclusion of state action. We believe that by these administrative rulings the EEOC could assert jurisdiction only if it received an affirmative request to do so from the charging party after the deferment period expired. (C.G. Opin. 11/18/65 and 12/2/65; Commission Decision 12/30/65, LRX 1892e)[11]

We submit this administrative interpretation is entirely consistent with the Act and with the conclusions of the

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[10] The pertinent EEOC regulation in force at the time that Mr. Love sent his charge directly to EEOC recognized that it had no jurisdiction for it provided EEOC "may not accept the charge for filing, but shall assist the aggrieved person in complying with Section 706(b)." (30 Fed. Reg. 8407, Br. App. A, p. 4a).

[11] This interpretation is set forth in its entirety in Appendix B of this brief at p. 7a.

Court of Appeals and inconsistent with the position now taken by petitioners. We, therefore, believe a thorough discussion of the interpretation is warranted. The first sentence recognized the clear language of Section 706(b) that "no charge [of discrimination] may be filed" with EEOC until it has been filed with the state agency for it says that "Where an unlawful employment practice is committed in a state to whose FEP agency the Commission is required to defer, Section 706(b) requires that a charge by the person aggrieved be filed first with the state agency." The next sentence concedes that EEOC jurisdiction can only attach after the deferment period of Section 706(b) has expired and then only if the filing is a timely one in accordance with Section 706(d), for its states that

> "If he thereafter wishes the Commission to assert jurisdiction, he may file his charge with the Commission at any time after 60 days . . . from the date the state proceeding was commended or earlier . . . if such proceeding has been earlier terminated, but the charge must be filed not later than 210 days after the alleged unlawful employment practice occurred, or within 30 days of the receipt of notice of the receipt of notice of the termination of the state proceedings, whichever is earlier."

The administrative decision also prescribes the procedure to be followed in the event the charge had been sent directly to it, for it is then stated that when a charge is filed with EEOC alleging an unlawful employment practice in a state to which it is required to defer, "the Commission will refer that charge to the state or local agency." This decision further says that after the deferral period of 60 days has elapsed, EEOC will "inquire whether or not he [the complainant] wishes the Commission to assert jurisdiction. If the charging party responds affirmatively, the Commission will proceed with its investigation." Thereby it is recognized that EEOC needs further word from the charging party for it to assert its jurisdiction. (C.G. Opin. 11/18/65 and 12/2/65; Commission Decision 12/30/65 LRX 1892e, Br. App. B, pp._____.

At the time Love filed his charge the EEOC did not consider that it had jurisdiction over prematurely filed complaints, nor did they believe that it could automatically assert jurisdiction over such prematurely filed complaints and would not do so until it had received a request to assert its own jurisdiction from the charging party after the deferment period had expired.[12] Patently, this administrative interpretation (LRX 1892e) was not followed in the instant matter for contrary thereto and contrary to the Act, the charge was filed by EEOC on May 23, 1966, when it was received by it,[13] the EEOC did not send the charge to the Colorado Civil Rights Commission as required by the Act (the Colorado Commission was only orally informed that a charge had been filed with the EEOC), and Love did not file a complaint with the Colorado Commission as he apparently was advised by the Colorado Commission to do. (A. 8). By letter dated June 1, 1966, the Colorado Civil Rights Commission Director advised the EEOC that it did not intend to proceed with the matter, noting that Love had not returned to file a complaint with the Colorado Commission. (A. 8) Love then had thirty days under the Act and interpretation to file a written complaint with the EEOC, but he did not do so, nor did the EEOC file one on his behalf.

[12]Indeed, as amicus curiae, EEOC recognized the necessity for a further request from the charging party within the statutory period in the event of a prematurely filed complaint before it could assert jurisdiction in *Martin Marquez v. Ford Division of Ford Motor Company*, 61 LC §9332 (cited at page 12 of petitioner Love's brief), the court stating:

> "The question still remains, however, as to when a charge is timely filed with the EEOC when a complaint is received prior to the filing of a charge with state authorities. The EEOC Procedural Regulations, *supra*, only states when the charge will not be accepted for filing. *Plaintiff and the EEOC claim that it is when the Commission received a further request from the complaining party that it assume jurisdiction, in this case* May 1, 1967." (Emphasis supplied)

[13]Perhaps it so held for Love's letter advised the EEOC that he had already been to the State Commission; that it did not understand his objective; and "enclosed a copy of their reply."

Moreover, the EEOC did not inquire of Love, within the ensuing thirty days, whether he wished it to assert its jurisdiction, nor did Love ask it to assert jurisdiction.

Petitioners seem to ignore (or maybe overlook) the above contemporaneous interpretations which, of course, are "entitled to great deference." *Griggs v. Duke Power Company*, No. 124, October Term, 1970, decided March 8, 1971, Slip. Op. at 9, *Udall v. Tallman*, 380 U.S. 1, and rely upon the 1968 amendment to the prior regulation, 29 C.F.R. 1601.12 (Br. App. A, pp. 4a-6a).

In 1968 the EEOC again reasoned when it adopted the amended regulation that complainants might be denied access to the courts if they did not comply with Sections 706(b) and 706(d). They amended the regulation to state that:

> "... persons who seek the aid of the Commission are often confused and even risk loss of protection of the Act. Accordingly, it is the intent of the Commission to simplify filing procedures for parties in deferral states and localities and thereby avoid the accidental forfeiture of important federal rights." (29 C.F.R. 1601.12(a) Br. App. A, p. 4a)

The new regulation then outlined the deferral procedure in greater detail. The new procedure required that the charge initially filed with EEOC be referred to the state commission by its sending a copy thereof by registered mail, return receipt requested, to the appropriate state or local agency; and it further provided that the aggrieved party shall be notified in writing that his charge has been forwarded to the appropriate state agency, and that "unless EEOC is notified to the contrary on the termination of state or local proceedings, or after sixty days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case." (29 C.F.R. 1601.12(iii), Br. App. A, at p. 5a)

Thus, the EEOC now says that it is not required to contact the charging party after the deferment period has

elapsed to determine whether he wishes it to proceed with the matter for they had previously notified him that upon the expiration of the deferral period, the EEOC will process the charge unless they have been advised to drop the matter.[14]

However, the EEOC did not even follow this regulation in the instant matter for it neither sent a copy of the charge to the State Commission nor advised Love that it would assert jurisdiction when the deferral period expired unless they heard to the contrary from him. In fact, it candidly admitted that it had not followed its own regulation in this matter in its amicus curiae brief filed in *Wright v. Brotherhood of Railway and Steamship Clerks, et al.*, 3 EDP § 8174 (D.C. Kan. April 5, 1971. In *Wright*, EEOC also urged that its 1968 amended regulation 29 C.F.R. 1601.12 was controlling and said at page 10 of its brief:

> "In *Love* the Commission did not properly follow its procedure [29 C.F.R. 1601.12] and a copy of the charge was never forwarded to the state agency."[15]

Since the EEOC admits it did not even follow the regulation as it had been amended in 1968 we submit the validity of that regulation is not ripe for determination by this court. Nevertheless, we will demonstrate that the regulation so adopted and relied upon by the petitioners contravenes the provisions of the statute, permitting, as it seems to do, the

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[14] Significantly, however, the 1968 regulation tacitly recognizes that the Equal Employment Opportunity Commission has no jurisdiction over charges filed with it prior to their being filed with the state commission, until such time as the deferment period has elapsed. The regulation further requires that the written charge itself be referred to the state commission for appropriate meaningful action. The regulation also requires notice be given to the charging party that the complaint has been referred to the State Commission for action and unless he notifies it not to do so, they will proceed to exercise their own jurisdiction after the deferment period has expired.

[15] We can only speculate why the EEOC takes a different position before this court.

holding of the charge in "animated suspense" for the deferral period and then allowing it to automatically assume jurisdiction without any further request from the complainant after the deferral period had elapsed.

Petitioners assert that the court in *International Brotherhood of Electrical Workers, Local 5 v. Equal Employment Opportunity Commission*, 398 F.2d 248 (C.A. 3), cert. denied 393 U.S. 1021, approved such procedure. We do not agree. In this case, as in the present case, the complainant wrote initially to EEOC. In *IBEW, Local 5* (unlike the present case) EEOC referred to the complaint to the appropriate state agency. After the deferral period, EEOC wrote the complainant inquiring whether he wished it to assert jurisdiction, and he replied affirmatively in writing within the time period prescribed by Section 706(d). This, of course, is entirely consistent with the prior interpretation placed upon the Act by EEOC (LXR 1892e, Br. App. B); it complies with Section 706(b) and Section 706(d) of the Act; and is completely inconsistent with what was done here. In upholding EEOC's action, the court held that the initial letter to EEOC "was not a valid charge when received . . . . for it had not been sent to . . . [the state commission]" and the deferral period had not expired. 398 F.2d 252. The court in *IBEW, Local 5* then ruled that when the complainant's answer to EEOC's letter inquiring whether or not he wished them to assert jurisdiction was received, the charge became an effective charge as of the date of receipt of the second letter which was within the statutory period.[16] Significantly, in Mr. Love's instance, the charge was never referred to the state; nor was Mr. Love's prematurely filed complaint revived by any subsequent direction (written or otherwise) within the statutory period. It is also significant to note that while the court in *IBEW, Local 5* may have approved by implication the prior interpretation of the Act (LRX 1892e) it did not consider nor decide the validity of

[16]The subsequent letter then maintained the proper filing sequence as set forth in Section 706(b) and satisfied the time requirement of Section 706(d).

the 1968 regulation (29 C.F.R. 1601.12) under which they presume to hold the complaint in suspense and take jurisdiction without further written request from the complainant party after the deferral period has expired by manipulating the filing date.

Two district courts have considered the suspended filing procedure, and each rejected it: *Voutis v. Union Carbide*, 321 F.Supp. 830 (S.D. N.Y. 1971); *Jefferson v. Peerless Pump*, 60 L.C. ¶ 9278 (C.D. Calif. 1969). The court in *Voutis* reasoned that the date of filing the charge "is not a matter to be determined by the mental operations of those in the EEOC organization; it is an objective fact, provable by evidence, and at latest is the date on which the charge is received by EEOC." (321 F.Supp. 834) The court in *Jefferson* noted that the rules of the EEOC as stated in the opinion of its general counsel recognized that a charge of unlawful employment discrimination has but one effective filing date, which is when it was received, and stated "the plaintiff's arguments to the contrary would permit the commission to disregard the law at their will and/or whim. . ." 60 LC ¶ 9278.

The Court of Appeals in this case held Love's letter was filed when it was received, noting "Its [EEOC's] own regulation states '. . . a charge is deemed filed when the commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of.'" (A. 60)

The record, likewise, reflects that Love's charge was filed when it was received by EEOC, May 23, 1966. (A. 49, 52)

In the event a charge is prematurely filed there is in reality no action pending before the EEOC because the Act specifically provides that "no charge may be filed" before the deferment period has expired. Section 706(b). This does not mean that a subsequent charge, if timely filed, cannot be processed. See *IBEW, Local 5*, supra. On the other hand, further action is required for Congress precisely so prescribed in Section 706(d) when it said that the charge

"shall be filed . . . within 30 days after receiving notice that the state or local agency has terminated the proceedings." The EEOC is not entitled to circumvent the mandates of Congress, as was attempted here, by regulation, manipulation or otherwise. *Dixon v. United States,* 381 U.S. 68 (1965).

We think the Court of Appeal's correctly reasoned that to permit flexible filing dates and manipulated procedure might well penalize compliance as well as reward noncompliance with the requirements of the Act (A. 70, 71). It should be remembered that a person has only 30 days from the date of the termination of the state proceedings within which to invoke the jurisdiction of EEOC. Section 706(d). Obviously it is possible and quite likely that a person who had followed the mandate of the Act and filed first with the state as required by Section 706(b) would be barred by the time requirements of Section 706(d) of the Act if EEOC did not file the charge when he sent it in, but rather waited for a response from the state. Certainly a precedent should not be established whereby one who complied with the Act is denied his day in court because the EEOC could manipulate the filing dates to save jurisdiction for one who has not complied with the Act.

The EEOC may be well advised to refer prematurely filed charges to the appropriate state agency with the intent of taking jurisdiction at a later time if necessary. However, the referral procedure must meet the statutory requirements which were not followed here.

III. THE PROCEDURE USED DID NOT COMPLY WITH THE ACT

A. § 706(b) Requires a Proceeding be Commenced Under State Law Before the EEOC May Assert Jurisdiction. The Law Requires That a Written Complaint be Filed to Commence Such a Proceeding. No Such Written Charge was Filed. The "Oral Advise Method" Does Not Meet the Jurisdictional Mandate of § 706(b).

It is unquestioned that Mr. Love was required to "commence a proceeding" before the Colorado Civil Rights Commission before EEOC could entertain jurisdiction. The Act itself is quite clear in this regard for Section 706(b) specifically states "no charge may be filed" with EEOC until "after proceedings have been commenced under the state or local laws."

The legislative history, if the same need be consulted in this regard, is equally clear. Senator Dirksen (with the respect to the enforcement of the Act) stated "we undertook to keep primary exclusive jurisdiction in the hands of state commissions for a sufficient period of time to let them work out their own problems at the local level." (110 Con. Rec. 13087) 1964.

Likewise, the regulation governing the agency at the time it received the charge provided "... the Commission may not accept the charge for filing..." 706(b) (30 Fed. Reg. 8407) unless state action had been had and a contemporaneous construction placed upon the Act by the Equal Employment Opportunity Commission stated in part that:

> "Where an unlawful employment practice is committed in a state to whose FEP agency the Commission is required to defer, Section 706(b) requires that a charge by the person aggrieved to be first filed with the state agency...." (LRX 1892e)

It should, therefore, come as no surprise that (at least to our knowledge) each court which has had the problem

before it has decided that both the EEOC and the court lacked jurisdiction over the subject matter until and unless the complaining party has proceeded under the available state law before filing a charge with the EEOC. See, for example, *Equal Employment Opportunity Commission v. Union Bank*, 408 F.2d 867 (C.A. 9); *International Brotherhood of Electrical Workers, Local 5 v. Equal Employment Opportunity Commission*, 398 F.2d 248 (C.A. 3) cert. denied at 393 U.S. 1021; *Edwards v. North American Rockwell Corporation*, 291 F.Supp. 199 (C.D. Cal.).

Although the Colorado statute requires a filing of a verified complaint "to commence a proceeding"[17] the Act is more lenient in that a verified charge is not required, but still provides that a written charge is necessary for Section 706(b) provides inter alia that:

> "If any requirement for the commencement of any such [state] proceedings is imposed by a state or local authority other than the requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceedings shall be deemed to have been commenced for the purpose of this subsection at the time such statement is sent by registered mail to the appropriate state or local authority."

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[17]CRS 1963 80-21-7(1):

> "Any person claiming to be aggrieved by a discriminatory or unfair employment practice may, by himself or his attorney-at-law, make, sign, and file with the commission a verified written complaint in duplicate which shall state the name and address of the person, employer, employment agency, labor organization, joint apprenticeship committee, or vocational school alleged to have committed the discriminatory or unfair employment practice complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The commission, a commissioner or the attorney general may in like manner make, sign and file such complaint."

The Act also recognizes that a written charge is necessary to commence a proceeding with the EEOC for Section 706 (a) states in part:

> "whenever it is charged in writing under oath by a person claiming to be aggrieved . . . EEOC will proceed to process the charge."

It is also significant to note that the 1968 regulation, which described the deferral procedure "in greater detail" specifically recognized the necessity that the state commission have a written charge upon which to act, for it states:

> "(b) The following procedures shall be followed with respect to cases arising in localities to which the Commission defers: (i) any document, whether or not verified, filed at any field office of the Equal Employment Opportunity Commission or at Washington, D.C., which may constitute a charge cognizable under Title VII shall be deferred to the appropriate state or local agency pursuant to the procedure set forth below . . . (ii) a copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate state or local agency." (29 C.F.R. 1601.12)

A written charge has never been filed with the State Commission (except that filed in 1963), although Love apparently was advised to do so by the Colorado Civil Rights Director (A. 8).

The EEOC did not forward to the State Commission a copy of Love's charge received by it on May 23, 1966 to the State Commission. They merely orally told the state director that a charge had been filed with it. This occurred in a discussion between the director of the Colorado Civil Rights Commission and a representative of the EEOC concerning overall policy. The subject of Mr. Love came up as sort of a shop-talk thing. (A. 43-45)

Not only does this "oral advise" practice engaged in by the EEOC not comply with the statute, it tends to deny the states the initial opportunity to process discrimination

charges and thereby bypasses the Congressional intent that the states have the initial "primary and exclusive" jurisdiction over the matter. The court of appeals recognized the inherent defect in the procedure the EEOC attempts to have the courts approve when it stated "This opportunity cannot come by an advice from EEOC that a complaint has already been filed with it. This practice seeks to channel complaints first to the EEOC which then "advises" the state agency, gives it 60 days, and then the EEOC automatically proceeds. The statute does not contemplate this procedure." (A. 61)

The petitioners may argue that a written complaint filed with the state commission was an unnecessary step in this case because Love had previously been to the state commission in 1965 and asserted orally the same charges. We do not agree. At the outset it should be noted that Love's prior contracts with the state were in fact considered by the trial court and formed the basis for its holding that Love waited too long to proceed before the EEOC because the state had terminated its proceedings July 30, 1965, and Love's charge was not received by EEOC until May 23, 1966. The court of appeals in the original opinion affirmed the trial court on this finding. However, since the 1965 proceedings were subsequently held on rehearing to antedate the effective date of Title VII, and hence were ineffective to commence the period from which Love's time ran to file with the EEOC, to be consistent these prior state proceedings must also be disregarded for all other purposes.

There is another reason why the filing of Love's written charge with the State Commission would not have been a useless act—the record indicates the contrary. In the first place, Love's letter received by the EEOC on May 23, 1966 stated the Colorado Commission did not appear to understand his objective—that it thought he wanted to become a Pullman conductor, while in fact all he wanted to do was to receive the same rate of pay as a conductor when he performed what he claimed were the duties and responsibilities

of a conductor.[18] In the second place, although the Colorado Commission declined to take Love's case to a hearing in the summer of 1965, Reynolds, the director, testified that the philosophy of the Colorado Commission had undergone changes by 1966 and that the treatment of the alleged discrimination in 1966 would have been different than prior thereto for it had adopted significantly different definitions of discrimination and now recognized they could do something about agreements between labor and management which were discriminatory to minority people. (A. 37-38). Congress intended the states have the initial "primary and exclusive" opportunity to resolve such discrimination. Who is to say, then, that had Love's charge been forwarded to the Colorado Commission as required by law that a meaningful result would not have been obtained? Had Love returned to the Colorado Commission and filed a complaint (as it was apparently suggested he do by the Colorado Civil Rights Commission Director (A. 8)) or had the EEOC forwarded his written complaint to the state commission as the regulation requires, we believe the state would have not only understood his complaint but processed it in line with their enlightened definitions of discriminatory practices.

We submit that the requirement that such a written charge be filed before the state commission as is required by law is not unreasonable or onerous. To the contrary a written statement is necessary for it defines the charge so that the parties and the respective commissions are on notice; preserves a record; and allows for the orderly processing of the complaint.

We submit that this statutory requirement is not met merely by oral advice from the EEOC to the State Commission that a discrimination charge has been filed with it. For

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[18] Did the Colorado Civil Right Commission really know the nature of the charge when it "waived jurisdiction" June 1, 1966? We submit it probably did not because the written charge was not submitted to it.

this reason alone the trial court lacked jurisdiction over the subject matter.

B. Even if the "Oral Advise" Method is Sufficient to Commence a State Proceeding and Thereby Comply With Section 706(b), Mr. Love's Filing With the EEOC Was Not Timely and, Therefore, Did Not Comply With the Jurisdictional Mandate of Section 706(d).

Section 706(d) requires that an aggrieved party file his charge with the EEOC ". ... within 210 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the state or local agency has terminated the proceeding under state or local law, whichever is earlier. . .".

The filing of a timely charge with the EEOC, in accordance with Section 706(d), is an absolute condition to the federal court's jurisdiction over the subject matter as provided in the provisions of Section 706(e) of the Act. One of the earliest determinations to this effect came from the EEOC's general counsel who advised "An individual may not file suit in a federal district court under Section 706(e) through (g) of Title VII where he has not timely filed a charge with the Equal Employment Opportunity Commission." (Opin. letter 4/19/66, LRX 1892b) To our knowledge there is total uniformity among the courts to the same effect. See *Choate v. Caterpillar Tractor Co.*, 402 F. 2d 357 (C.A. 7, 1968); *Stebbins v. Nationwide Mutual Insurance Company*, 282 F.2d 267 (C.A. 4) cert. denied 390 U.S. 910.

The termination date of the state proceedings is the key to the issue as to whether Mr. Love made a timely filing with the EEOC. There are only two conceivable termination dates present here, namely, July 30, 1965 and June 1, 1966. These will be discussed in order.

The trial court found that Love had substantially complied with the statute so as to invoke the state machinery in 1965. The trial court then found that the state had terminated its proceedings on July 30, 1965 and had so advised Love. Since the earliest contact Love had with the EEOC was May 23, 1966, the trial court held that he had not filed a complaint with the EEOC within the time limits prescribed by Section 706(d). The court of appeals on rehearing held this was all immaterial since the 1965 acts complained of antedated the effective date of the Act.

We question this conclusion of the Court of Appeals because if the acts of discrimination "were continuing" as urged by Love, then the fact of such discrimination was at issue and had been considered by the Colorado Commission when it terminated its proceeding on July 30, 1965, which was after the effective date of Title VII of the Act.

If the 1965 proceedings before the Colorado Civil Rights Commission are disregarded for any reason, the only other termination date applicable is June 1, 1966. We fail to see how this date benefits Love. We have already shown that the letter received by EEOC May 23, 1966 was ineffective to initiate the action because Section 706(b) of the Act required a prior filing with the State Commission. To the same effect is the holding in *IBEW, Local 5, supra.* The only other communication between Love and the EEOC was the formal charge filed July 23, 1966, which was more than 30 days after termination of the state proceedings allowed for filing by Section 706(d). This, of course, is fatal to Love's position.

We believe we have already shown that the Equal Employment Opportunity Commission does not have authority to manipulate the filing dates. If more need be said, we direct the court's attention to another contemporaneous construction of the Act by the Equal Employment Opportunity Commission's general counsel which provided as follows: "A charge has one effective date with regard to all subdivisions of Section 706: The date when a sworn or unsworn

statement of facts indicating that an unlawful employment practice has occurred is received by the Commission. . . " C.G. Opinion 11/10/65 LRX 1892a.

Therefore, Love's charge to the EEOC received May 23, 1966 was premature, and thus the EEOC lacked subject matter jurisdiction. The charge filed July 23, 1966 was untimely because it was outside the statutory period prescribed by Section 706(d).

Unquestionably Title VII of the Civil Rights Act is remedial in nature. Nevertheless, in order to accomplish its remedial purpose, it is necessary that the EEOC act within the jurisdictional limits imposed by Congress. The charging party has 30 days after the State has terminated its proceeding to initiate action with EEOC, and this is quite analogous to the requirement of Section 706(e) which allows the aggrieved person 30 days after notification by the EEOC that conciliation has failed within which to commence a court action.

In *Goodman v. City Products Corporation*, 425 F.2d 702 (C.A. 6), it was held that a complaint filed in the court 31 days after receipt of a notice advising that conciliation has failed was barred under the provisions of Section 706(e). The court said:

> "As regards judicial extension of the time limitation to further the remedial purpose of the legislation, it is sufficient to cite the following language from the United States Supreme Court case of Kavanagh v. Noble, 332 U.S. 535, 68 S.Ct. 235, 92 L.Ed. 150 (1947), where, in dealing with a limitation provision in the tax law, the Court had this to say:
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> > 'Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. Rosenman v. United States, 323 U.S. 658, 661, 65 S.Ct. 536, 89 L.Ed. 535. Remedies for resulting inequities are to be provided by Congress, not the courts.'" (425 F.2d 703-704)

This court has heretofore refused to disregard a six month statute of limitations as an unreasonable period in which to commence an action to resolve labor difficulties. In *Local No. 1424, International Association of Machinsts v. National Labor Relations Board*, 362 U.S. 411 (1960), this court reversed a decision of the National Labor Relations Board which had held that the remedial effects expected to be gained by enforcement were more important and took precedence over a time limitation in which enforcement must occur saying:

> "As expositor of the national interest, Congress, in the judgment that a six-month limitations period did 'not seem unreasonable,' . . . barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights. 'It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. * * *." *Id.* at 428-9.

It has been urged that the procedures provided by Congress under Title VII are complex, and Love should not be precluded from bringing the action because he attempted in good faith to comply with the Act. But it must be remembered that the State Director offered the further services of the state's Civil Rights machinery on June 30, 1965, and Love did not see fit to have the Director proceed. Instead, he went directly to EEOC thereby by-passing the state machinery to which Congress decreed the agency must defer. Be this as it may, the requirements of Congress that the charging party first utilize the state machinery (Section 706(b)) and then file with the EEOC within the statutory period provided for in Section 706(d) are precise and do not create unnecessary procedural bars to the federal courts. Congress decided, after long debate and for well-considered reasons, to create a new right and prescribe the means of obtaining it. As stated by the United States and the EEOC in their brief the Act imposed upon Love the burden of securing enforcement of Title VII by means of a private lawsuit. Love, however, ignored the precise statutory require-

ments of the Act. This he cannot do for it is contrary to the well-established legal principle that when rights asserted are statutory in nature, compliance with the statute in question is a jurisdictional prerequisite to the commencement of a civil action based thereon. *Edward v. North American Rockwell Corp.*, 291 F.Supp. 199 (C.D. Cal. 1968); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (C.A. 7 1968); *Stebbins v. Nationwide Mutual Insurance Company*, 282 F.2d 267 (C.A. 4) cert. denied 390 U.S. 910; *EEOC v. Union Bank*, 408 F.2d 867 (C.A. 9).

IV. THE CONTINUING VIOLATION THEORY CANNOT APPLY AND STILL GIVE ANY MEANING TO THE SEQUENCE OF FILING REQUIREMENTS OF SECTION 706(b) AND TO THE TIME REQUIREMENTS OF SECTION 706(d).

We do not believe that the question of whether a "continuing violation" theory tolls the statute is ripe for determination by this court because the Court of Appeals on rehearing affirmed the District Court on the ground that the "oral advise" method did not comply with the Act, and the manipulated procedures attempted by the EEOC were contrary to the Congressional intent.

Love, however, raises the question in his brief, and we will, therefore, briefly comment upon this.

Of crucial importance is the fact that Congress clearly intended, and so provided, that the state shall have the initial opportunity to handle discrimination charges; and, accordingly, imposed a filing sequence under Section 706(b) requiring that an aggrieved individual must first seek redress before the state body.

Interdependent with Section 706(b) is Section 706(d) which requires such an individual to file his charge within 30 days after the state has terminated its proceedings in order to preserve his right to be heard before the federal agency.

The cases cited for the proposition that a continuing violation tolls the time requirements of Section 706(d) concern only those charges which may be filed directly with the EEOC; none of these cases consider the continuing violations theory, in the situation which we have here, namely, the requirement that the individual first utilize the state machinery and then comply with the time requirements of Section 706(d). We submit there can be no such authority; such a holding would render meaningless the requirement of the Act that the charging party first go to the state and then file with the EEOC within the time prescribed by Section 706(d). To permit such an argument would be tantamount to saying that, yes, an individual must go to the state first and exhaust his remedies, but if a discrimination is of a continuing nature, the 30 day period to file with the EEOC as provided for in Section 706(d) may be disregarded; or it would be tantamount to saying that if the discrimination is of a continuing nature, he is not required to go to the state first as required by Section 706(b), but the EEOC may consider his complaint in the first instance. Obviously, this would destroy the sequence of filing requirements set forth by Section 706(b) and the time requirements of Section 706(d). Once the proceeding is started the continuing violation theory can have no application.

V. THE DEFECTS COMPLAINED OF BY THE PULLMAN COMPANY GO TO THE QUESTION OF THE COURT'S JURISDICTION OVER THE SUBJECT MATTER

Love asserts that the objections raised by The Pullman Company that Mr. Love did not comply with Section 706 (b) or 706(d) of the Act cannot be raised for the first time in the District Court. What Love fails to recognize is that these defects go to the question of the court's jurisdiction over the subject matter of the case. *EEOC v. Union Bank*, supra; *IBEW, Local 5 v. EEOC*, supra, *Choate v. Caterpillar Tractor*, supra; *Stebbins v. Nationwide Mutual Ins. Co.*, supra.

Subject matter jurisdiction cannot be waived; it cannot be supplied by the consent of the parties; and objection to lack of such jurisdiction may be interposed at any stage of the action. Federal Practice and Procedure, *Barron & Holtzoff*, Vol. 1A, Sec. 370. Indeed, if the record does not affirmatively show jurisdiction over the subject matter, this court "must on its own motion so declare, and make such orders as will prevent (the district court) from exercising an authority not conferred upon it by statute." *Minnesota v. Northern Securities Company*, 194 U.S. 48, 61.

Administrative agencies are not exempt from this long established tenent of the law. *Rigby v. Rassmussen*, 275 F. 2d 861 (C.A. 10).

The Pullman Company properly asserted the defenses that the EEOC and the Court lacked jurisdiction over the subject matter in the District Court.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS AND REGULATIONS

Section 706 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, provides:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.
>
> (b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice

or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed

the procedure set out in subsection (b), of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

The regulation in effect at the time the charge in this case was lodged with the Equal Employment Opportunity Commission (30 Fed. Reg. 8407) provided:

> In any instance in which an aggrieved person seeks to file a charge and it appears from the charge or from other information that the aggrieved person has not begun proceedings before a State or local authority pursuant to section 706(b) of Title VII, the Commission may not accept the charge for filing, but shall assist the aggrieved person in complying with Section 706(b).

The present regulation of the Equal Employment Opportunity Commission regarding referrals, 29 C.F.R. 1601.12, provides:

> (a) In order to give full weight to the policy of section 706(b) of the Act which affords State and local fair employment practice agencies that fall within the provisions of that section an opportunity to resolve disputes involving alleged discrimination concurrently regulated by Title VII of the Civil Rights Act of 1964 and State or local law, the Equal Employment Opportunity Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to the State or local agency. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to the State or local agency as is permitted by law and is practicable. It is the experience of the Commission that because of the complexities of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of protection of the Act. Accordingly, it is the intent of the Commission to simplify filing procedures for parties in deferral States and localities, and thereby avoid the accidental forfeiture of important Federal rights.

(b) The following procedures shall be followed with respect to cases arising in the localities to which the Commission defers:

(1) Any document, whether or not verified, filed at any field office of the Equal Employment Opportunity Commission or at Washington, D.C., which may constitute a charge cognizable under Title VII, shall be deferred to the appropriate State or local agency pursuant to the procedures set forth below.

(i) All such documents shall be date and time stamped on receipt.

(ii) A copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate State or local agency.

(iii) The aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the State or local agency pursuant to the provisions of section 706(b), and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case. Where the State or local agency terminates its proceedings within 60 days of the date of receipt of the document without notification to the Commission of such action, the date on which the aggrieved party is notified of the termination of the State or local action shall be deemed to be the date that the document was filed as a charge with the Commission.

(iv) The sixty-day period shall be deemed to have commenced on the receipt of the document by the State or local agency as evidence by the date indicated on the return receipt. On notification of termination of State proceedings or the expiration of 60 days, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case.

(v) In cases where the document is filed with the Commission more than 150 days following the alleged act of discrimination but less than 210 days therefrom, the case shall be deferred pursuant to procedures set forth above: *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceeding, the Commission will consider the charge to be filed with the Commission on the 209th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceeding prior to the 209th day following the alleged acts of discrimination, without notification to the Commission of such action, the date on which the aggrieved party is notified of the termination of the State or local action shall be deemed to be the date that the document was filed as a charge with the Commission.

APPENDIX B

Counsel General Opinions of November 8, 1965, and December 2, 1965; EEOC Decision of December 30, 1965 (LRX 1892e) provide:

Where an unlawful employment practice is committed in a state to whose FEP agency the Commission is required to defer, Section 706(b) requires that a charge by the person aggrieved be filed first with the state agency. If he thereafter wishes the Commission to assert jurisdiction, he may file his charge with the Commission at any time after 60 days (120 days during the first year in which the state law is effective) from the date the state proceeding was commenced or earlier if such proceeding has been earlier terminated, but the charge must be filed not later than 210 days after the alleged unlawful practice occurred or within 30 days of receipt of notice of the termination of the state proceeding, whichever is earlier.

Where a charge is filed with the Commission alleging the commission of an unlawful employment practice in a state or locality to whose FEP agency the Commission is required to defer, the Commission will refer that charge to the appropriate state or local agency. Sixty days after the commencement of such state or local proceedings (or 120 days in appropriate cases), the Commission will notify the charging party that the 60-day (or 120-day) period has expired and inquire whether or not he wishes the Commission to assert jurisdiction. If the charging party responds affirmatively, the Commission will proceed with its investigation.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

~~No. 967~~ 70-5033

EARL A. LOVE, UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

vs.

THE PULLMAN COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICUS CURIAE

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OPINIONS BELOW

The opinion on rehearing (A. 67-71) and the original opinion of the Court of Appeals (A. 56-66) are reported at 430 F.2d 49. The order of the district court (A. 12-14) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals on rehearing was entered on July 30, 1970 (A. 73). On October 1, 1970, Mr. Justice White extended the time for filing a petition for writ of certiorari to November 12, 1971. The petition was filed on November 10, 1970, and was granted on February 22, 1971. The jurisdiction of the Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Were Petitioner's good faith efforts to comply with the procedural requirements of Title VII (as interpreted for him by the Equal Employment Opportunity Commission) sufficient to afford the district court jurisdiction to hear his claim of racial discrimination on its merits?

II. Assuming Petitioner's efforts were in some respect defective, should he be penalized for any such irregularity when it occurred because of the actions of the Equal Employment Opportunity Commission?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964 and the pertinent regulations of the Equal Employment Opportunity Commission are set forth as Appendix A to the Brief of the United States and the Equal Employment Opportunity Commission.

INTEREST OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

The National Association for the Advancement of Colored People has historically sought redress through the courts and the administrative agencies for acts of discrimination based upon race. In the critical area of em-

ployment discrimination the major vehicle at the federal level for obtaining relief is Title VII of the Civil Rights Act of 1964, which is administered by the Equal Employment Opportunity Commission. The NAACP is vitally concerned with the effective administration of Title VII by the EEOC. The NAACP is also vitally concerned with the problem of the private litigant who bears the primary responsibility for obtaining judicial enforcement of the Act. The decision of the Court of Appeals for the Tenth Circuit has the effect of destroying the simple, effective machinery which the EEOC has developed to administer critical provisions of Title VII. It has placed in jeopardy the jurisdiction of the EEOC and the federal courts over thousands of potentially meritorious charges of employment discrimination. It creates serious and unnecessary procedural hazards for the lay citizen seeking to exercise his federal right to judicial or administrative relief from discrimination. Therefore, the decision of the court below is inimical to the public as a whole, to the interests of persons whom the NAACP represents, and to the programs for eliminating employment discrimination carried out by the NAACP.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

The National Association for the Advancement of Colored People respectfully moves this Court for leave to file the attached brief amicus curiae in the above-styled case for the reasons set forth below:

PROCEEDINGS BELOW

Petitioner Earl Love, a black man, was employed as a porter by Respondent Pullman Company for more than forty years. From 1951 until his retirement in November 1968, Mr. Love was classified as a "porter in charge".

This is the ninth year since Petitioner began formally challenging, as racially discriminatory, the fact that his job classification has historically been reserved for blacks, while white persons, performing the identical duties, are called "conductors". Persons performing duties in the white classification of conductor receive a substantially higher wage than those working in the black classification of porter.

Petitioner Love began his quest for relief from racial discrimination well before the enactment of Title VII of the Civil Rights Act of 1964 by filing, in 1963, a charge of discrimination with the Colorado Civil Rights Commission. The Colorado Commission apparently took no action on this complaint. In 1965, Petitioner orally renewed his allegations of race discrimination which the state commission treated as a reopening of the 1963 case.

The 1965 state proceedings were terminated in July of that year when Petitioner turned down, as unacceptable, an offer by the Pullman Company to promote him to the conductor classification but only at the price of forfeiting the forty years' seniority protection against layoffs which he accumulated in the (black) porter's classification. To accept this offer would have cost him his job since without seniority he would have been laid off.[1]

Still being subjected to the discriminatory classification and pay practices, Petitioner next sought to enlist the aid of the Equal Employment Opportunity Commission

1. It should be noted that such an offer falls far below the remedy of elimination of present effects of past discrimination, mandated by Title VII. *U. S.* v. *Bethlehem Steel,* F.2d , 3 FEP Cases 589 (C.A. 2 1971); *Griggs* v. *Duke Power Co.,* 420 F.2d 1255 (4th Cir. 1970), rev'd on other grounds 401 U.S. 424 (1971); *Local 189 United Papermakers and Paperworkers* v. *U. S.,* 416 F.2d 980 (C.A. 5 1969), cert. denied 347 U.S. 919 (1970).

(EEOC). On May 19, 1966, Mr. Love wrote the EEOC to complain of the same discrimination which the state had failed to remedy. The communication was received by the EEOC on May 23, 1966.

Like many other Title VII claimants, Petitioner had submitted his charge of discrimination to the EEOC without first sending it to a state agency with jurisdiction over the complaint. Since Petitioner was making an essentially new charge of discrimination based upon the continuing discrimination by Respondent, under Section 706(b) the Colorado Commission was to be given an opportunity to act prior to the commencement of the federal investigation.

At the time Petitioner's charge was submitted, the EEOC had promulgated procedural regulations which applied to such charges (30 Fed. Reg. 8408):

> "In any instance in which an aggrieved person seeks to file a charge and it appears from the charge or other information that the aggrieved person has not begun proceedings before a state or local authority pursuant to Section 706(b) of Title VII, the Commission may not accept the charge for filing *but shall assist the aggrieved person in complying with Section 706(b).*" (Emphasis added).

In accordance with this procedure, the EEOC contacted the Colorado Commission to advise it of Petitioner's letter of May 19, 1966. The response of the Colorado Commission was contained in a letter of June 1, 1966, in which the Director of that agency stated that, in light of its previous contacts with Mr. Love and its unsuccessful attempts to resolve that discrimination, the State Commission "could not in good conscience accept the sixty day deferral period and accordingly waive[s] it."

The EEOC then "filed" Petitioner's charge on June 1, 1966, the date the state waived jurisdiction. On July 23, 1966, Petitioner transferred his earlier letter charge to a standard EEOC charge form.

The EEOC processed his charge of discrimination for nearly two years. During that time, Rospondent did not dispute the EEOC's jurisdiction to process the charge, either at the time the charge resulted in a finding of reasonable cause to believe that Title VII had been violated, or in the subsequent, unsuccessful conciliation efforts. Upon the failure of conciliation efforts, the EEOC on May 3, 1968, advised Petitioner that he had thirty days within which to commence a civil action to compel compliance with Title VII. This suit was commenced within that time period.

On Respondent's motion the District Court dismissed the action on the ground that the EEOC, under Section 706(b) of Title VII, had never acquired jurisdiction over Petitioner's charge. The assigned reason was that these federal proceedings had not been commenced within 30 days of what the court ruled was the termination of Petitioner's state proceeding in July of 1965. The District Court did not discuss the events of May and June 1966 wherein the EEOC advised the State of the charge, the State explicitly waived jurisdiction, and EEOC thereupon assumed jurisdiction over the charge of discrimination.

By a two-to-one vote, the Court of Appeals affirmed on two grounds. First, the majority upheld the district court's ruling that the failure to file a complaint with the EEOC within 30 days of the Colorado Commission's 1965 reopening barred the action under Title VII. Second, the majority ruled that even if the failure to file in 1965 was not a bar, the EEOC was without authority to treat Mr.

Love's charge as "filed" on May 23, 1966, and therefore lacked authority "without further correspondence from (Petitioner)" subsequently to treat it as filed on June 1, 1966, the date on which the State of Colorado waived jurisdiction. The Court specifically invalidated the procedure followed by EEOC in Petitioner's case, and which had by that time become the standard agency practice in the processing of many thousands of similar charges. In his dissent, Judge Fahy stated that after the Colorado Commission waived jurisdiction EEOC was "entitled" to "assume jurisdiction," and that the majority's ruling "unduly restricts the right of EEOC to entertain and expedite claims for which it has a responsibility under the Act to seek a solution."

Primarily because of the potential invalidation of similar charges of discrimination, both the Department of Justice and the EEOC (which had appeared as *amicus* before the original panel) sought and were granted the right to intervene. Petitioner and the intervenors moved for rehearing or, in the alternative, rehearing *en banc*. The case was reargued before the original panel which upheld its earlier result by a two-to-one vote, with each member of the panel filing his own opinion. Judge Seth, who had written the earlier majority opinion, acknowledged that the primary ground of his earlier decision—that the failure to file within 30 days of the termination of the 1965 proceedings of the Colorado Commission barred further action by EEOC—was erroneous, since the 1965 complaint involved conduct occurring prior to the effective date of Title VII, and now rested on the second leg of the earlier decision—that EEOC did not, as a matter of law, gain jurisdiction over the charge in the absence of a specific affirmation by Petitioner that he continued to desire federal relief.

Chief Judge Lewis concurred in a one paragraph opinion because he did not wish to give "judicial approval to administrative 'flexible' filing to obtain, postpone, or reject jurisdiction." Judge Fahy dissented again, agreeing with the Court that the 1965 complaint involved conduct prior to the effective date of Title VII, but otherwise adhering to his earlier views.

Discussion

Carving through the confusion of Sections 706(b) and (d) and the five opinions of three circuit court judges seeking to interpret these sections, it finally becomes apparent that this case presents a simple, straightforward issue: Did petitioner lose his right to seek relief from racial discrimination under Title VII because he failed to write a letter reaffirming an earlier written request that EEOC investigate his case?

Courts faced with analogous questions involving alleged technical defects in complying with other procedural provisions of Section 706 have almost universally answered "No" because they have refused to elevate form over substance and thereby defeat the humanitarian, remedial purposes of the Act. *Sanchez* v. *Standard Brands*, 431 F.2d 455 (C.A. 5 1970); *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (C.A. 5 1970). The approach of the majority below, on the other hand, rests in a profoundly disturbing view of the purpose and intent of Title VII, for it is clear that a majority of that court believes that the statute is to be rigidly interpreted and that the most inconsequential procedural considerations outweigh serious substantive issues,—that Congress intended in Section 706(b) and (d) to create a succession of procedural pitfalls to trap the litigant and deny him the substantive rights the law putatively offers.

ARGUMENT

I.

Petitioner Adequately Complied with the Requirements of Section 706.

A. The Purpose of Section 706.

The normal starting point for the analysis of any statute is, of course, its language. Section 706(b) provides as follows:

> "In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."

Section 706(d) provides as follows:

> "A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an

> unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

As the court noted in *Vigil* v. *American Telephone and Telegraph Co.*, 305 F.Supp. 44 (D. Colo. 1969), a technical reading of these provisions would require that "to meet the Act's requirements a plaintiff would have a Philadelphia solicitor in constant attendance and he might miss a turn even with this assistance." Thus, the wooden approach taken by the court below is hardly appropriate in interpreting these sections.

This is especially true because of the fact that the statutory scheme set up by Congress relies on the lay private citizen for enforcement of the national policy against racial discrimination. Thus, courts interpreting Section 706 have recognized that its procedural provisions —designed to give the federal, state and local governments an opportunity to remedy discrimination by administrative means—are secondary to the overriding purpose of creating a private right-of-action to enforce the law. *Dent* v. *St. Louis-San Francisco Ry. Co.*, 406 F.2d 399 (C.A. 5 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357 (C.A. 7 1968). Adhering to the principle that lay persons upon whom the Act depends for enforcement should not be subjected to a system of procedural forfeitures, courts have held the following statutory provisions do not generate jurisdictional requirements:

(1) *Failure to file a charge with EEOC* as provided by Section 706(d). *DeFigueriredo* v. *TWA*, 322 F. Supp. 1384 (S.D. N.Y. 1971) (where EEOC had already processed the identical charge of another person, filing by plaintiff would be a "futile ceremony" and was not required.)

(2) *Swearing of charges* as provided in 706(a). *Weeks* v. *Southern Bell Tel. & Tel. Company*, 408 F.2d 228 (C.A. 5 1969); *Blue Bell Boots* v. *EEOC*, 418 F.2d 355 (C.A. 6 1969); *Choate* v. *Caterpillar Tractor, supra.*

(3) *Service of the charge* as provided in Section 706(a). *Mondy* v. *Crown Zellerbach*, 271 F.Supp. 258 (E.D. La. 1967), *reversed on other grounds sub nom. Oatis* v. *Crown Zellerbach*, 398 F.2d 496 (C.A. 5 1968); *IBEW, Local 5* v. *EEOC*, 398 F.2d 248 (C.A. 3, 1968), *cert. denied*, 393 U.S. 1021 (1969).

(4) *Filing suit prior to completion of the administrative process* as provided by 706(a), (e). *Johnson* v. *Seaboard Airlines RR.*, 405 F.2d 399 (C.A. 5 1969).

(5) *Failing to file suit within a specified number of days following the filing of the administrative charge* as provided by 706(a), (e). *Cunningham* v. *Litton Industries*, 413 F.2d 887 (C.A. 9 1969); *Miller* v. *International Paper*, 408 F.2d 283 (C.A. 5 1969).

(6) *Failing to file suit within 30 days of the receipt of statutory notice of the right to sue* as provided by 706(e). *McQueen* v. *EMC Plastic Co.*, 302 F.Supp. 881 (E.D. Tex. 1969); cf. *Antonopulos* v. *Aerojet-General Corp.*, 295 F.Supp. 1390 (E.D. Calif. 1968).

(7) *Filing with the EEOC prior to 60 days after a charge was filed with the state agency* as provided by 706(b) and (d). *Vigil* v. *American Telephone & Telegraph Co.*, 305 F.Supp. 44 (D. Colo. 1969).

We submit that the underlying principle of these decisions is that the procedural provisions of Title VII are

not to be viewed as like the requirements of common law pleading prior to the Reform Act, and that variances from the literal language of the Act cannot be allowed to prevent a hearing on the merits unless the irregularity so frustrates the purposes of the provision violated and so prejudices the defendant as to make it unjust to allow a hearing on the merits. Cf. *Henry* v. *Mississippi*, 379 U.S. 443 (1965) (application of state procedural rules must serve "legitimate state interest" if defendant is to be foreclosed from a hearing on his federal claim).

Viewed in the context of these cases, the appropriate inquiry here is whether the essential requirements of Section 706(b) and (d) were adequately met by petitioner and if not whether there was any prejudice to respondent to such degree as to foreclose plaintiff's claim that he has been denied equal opportunity for employment because of his race.

The intent of Congress in Section 706((b), as explained by Senator Humphrey, who, with Senator Dirksen, co-authored the section, was ". . . to guarantee that these States—and other states which may establish such programs—will be given every opportunity to employ their expertise and experience without premature interference by the federal government. . . ." (110 Cong. Rec. 12752). Senator Humphrey made it clear, however, that the right to federal relief under Title VII could not be defeated by the states where local solutions were not obtained stating, "At the same time, we recognized the *absolute* necessity of providing the Federal Government with authority to act in instances where States and localities did not choose to exercise these opportunities *to solve* the problems in a voluntary and localized manner." (Ibid.) (Emphasis added).

The legislative history of the time limitations contained in Section 706(d) is by no means as clear. We submit, however, that it is fair to conclude that the primary Congressional purpose in setting the various limitations was to assure that federal authorities were brought into a case while the matter was still fresh.

B. Petitioner Satisfied the Basic Purposes of Both Section 706(b) and Section 706(d).

With respect to Section 706(b), petitioner twice brought his complaint of racial discrimination before the Colorado Commission prior to the effective date of Title VII; twice the Colorado Commission failed to achieve a satisfactory resolution of the matter. Moreover, when petitioner applied to the EEOC for help, EEOC passed the complaint on to the Colorado Commission which specifically waived its jurisdiction. In these circumstances it can hardly be argued that the Colorado Commission was not given an opportunity to resolve the matter prior to the commencement of the federal investigation. Nor can it be argued that there was any prejudice to Respondent since it had earlier used the Colorado Commission to convey its unacceptable offer to petitioner.

Similarly, the purpose of Section 706(d) was accomplished by the procedures followed by petitioner. In view of the fact that continuously, during the entire period in which the administrative process was going on, petitioner was subjected to the identical policy of segregation which he believed to be unlawful, it is incontestible that the matter was fresh at the time that Petitioner brought it to the federal agency; the fact of the matter is that his initial complaint to the EEOC was concurrent with the conduct complained of. Certainly the Respondent who participated in the entire administrative process for two

years can hardly be said to have been legally prejudiced by the failure of Petitioner to file a second request for EEOC to proceed within 30 days of June 1, 1966. Indeed, Petitioner did file a sworn charge with EEOC on July 23, 1966. In view of the fact that the discriminatory practice which he complained was ongoing, and that Colorado had waived jurisdiction, certainly this sworn charge could be considered adequate compliance with Sections 706(b) and (d). Cf. *DeFigueiredo* v. *Trans World Airlines*, *supra*.

C. The Irregularities Found by the Court Below Are Inadequate As a Matter of Law and Policy to Be Jurisdictional Defects.

The court below never considered whether the procedures followed by petitioner met these basic purposes of the Act because it never even bothered to consider what those purposes are. Rather, the majority chose to read Section 706(b) and (d) as mechanically as possible to arrive at the conclusion that (as we distill it from the three opinions of the two-man majority) the following improprieties existed in the procedure followed by petitioner: (1) his initial filing in 1966 was with the EEOC rather than the Colorado Commission; (2) having filed with the EEOC, he allowed the EEOC to forward his complaint to the Colorado Commission rather than doing it himself; and (3) he did not restate his desire for EEOC to process his complaint after the Colorado Commission waived jurisdiction.

As a policy matter, it is unthinkable that such banal considerations as these could outweigh a national policy "of the highest priority". *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968). But even examining these alleged irregularities on their merits, it would be difficult to sustain them as jurisdictional defects. The first

two objections raised by the majority below amount to an invalidation of the EEOC's "deferral" procedures whereby complaints filed with the EEOC are referred to a state agency whenever the law so requires. This is perhaps the most disturbing aspect of the decision below, since about 18% of the charges handled by EEOC annually are deferred to state agencies in order to comply with Section 706(b).[2] The "deferral" procedure, which was embodied in a one paragraph EEOC regulation at the time petitioner filed his charge,[3] and is now set out in a much more detailed regulation,[4] is eminently sound and rea-

2. In Fiscal Year 1970, EEOC received 3,550 complaints in States with fair employment practice agencies from parties who had not contacted the State or local agency. The total number of complaints filed with the EEOC during that year 21,121. EEOC *Fifth Annual Report* pp. 82-83. This includes charges filed in southern and border states which do not have FEP laws.

3. See 30 Fed. Reg. 8408.

4. See 29 C.F.R. §1601.12 which now provides, in relevant part that:

> (a) In order to give full weight to the policy of section 706(b) of the Act which affords State and local fair employment practice agencies that fall within the provisions of that section an opportunity to resolve disputes involving alleged discrimination concurrently regulated by Title VII of the Civil Rights Act of 1964 and State or local law, the Equal Employment Opportunity Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to the State or local agency. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to the State or local agency as is permitted by law and is practicable. It is the experience of the Commission that because of the complexities of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of protection of the Act. Accordingly, it is the intent of the Commission to simplify filing procedures for parties in deferral States and localities, and thereby avoid the accidental forfeiture of important Federal rights.
>
> (b) The following procedures shall be followed with respect to cases arising in the localities to which the Commission defers:

sonable. It obviates the red tape and possible confusion and disillusionment which might be engendered if the lay complainant were to be given the "run around" of having the EEOC return his complaint with instructions to file with some State or local agency. As the interpretation of a statute by the administrative agency charged with its implementation, the action taken by EEOC on Petitioner's complaint is entitled to great weight. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Udall* v. *Tallman*, 380 U.S. 1 (1965). It should not be rejected as the majority below did as a capricious "administrative 'flexible' filing". Moreover, the practice of deferring to a state agency in this manner had already been specifically ap-

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(1) Any document, whether or not verified, filed at any field office of the Equal Employment Opportunity Commission or at Washington, D.C., which may constitute a charge cognizable under Title VII, shall be deferred to the appropriate State or local agency pursuant to the procedures set forth below.

(i) All such documents shall be date and time stamped on receipt.

(ii) A copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate State or local agency.

(iii) The aggrieved party shall be notified, in writing, that the document which he sent to the Commission has been forwarded to the State or local agency pursuant to the provisions of section 706(b), and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60 days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case. Where the State or local agency terminates its proceedings within 60 days of the date of receipt of the document without notification to the Commission of such action, the date on which the aggrieved party is notified of the termination of the State or local action shall be deemed to be the date that the document was filed as a charge with the Commission.

(iv) The sixty-day period shall be deemed to have commenced on the receipt of the document by the State or local agency as evidenced by the date indicated on the return receipt. On notification of termination of State proceedings or the expiration of 60 days, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case.

proved by the Court of Appeals for the Third Circuit in *IBEW, Local 5 v. EEOC,* 398 F.2d 248 (C.A. 3, 1968), a decision which Judge Fahy pointed out in dissent was relied upon by the majority here, and in a case recently decided by the Eighth Circuit, *Marquez* v. *Sales Office Ford Motor Co.,* ..... F.2d ....., 3 FEP Cases 275, 276 (C.A. 8, 1971); see also *Fix* v. *Swinerton and Walberg Company,* ..... F.Supp. ....., 3 FEP Cases 9 (D. Colo. 1970).

In sum, the first two alleged defects found by the court below, (1) that Petitioner in 1966 sought the aid of the EEOC prior to filing a charge with the Colorado agency, and (2) allowing the EEOC to communicate his complaint to the Colorado Commission rather than doing so himself, are not inconsistent with the requirements of Section 706(b), even when that Section is given a rigid reading. Thus, the court below invented requirements for filing where the statute has none.

The remaining objection of the majority below was that petitioner did not reaffirm his desire for EEOC to process his complaint after the Colorado Commission waived jurisdiction. The conclusion that such a defect is a fatal infirmity seems to us absurd. Petitioner had twice been to the Colorado agency and received no relief. He had been seeking relief for more than nine years. The federal remedy had just become available, and he clearly indicated his desire to use it. To conclude that Petitioner lost interest in pursuing his federal remedies within the two weeks between his initial contact with EEOC and the waiver of jurisdiction over the case by Colorado requires going beyond the reasonable.[5]

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5. Current EEOC regulations adopt the more reasonable conclusion by informing those who file with the EEOC in state with fair employment laws that EEOC will begin processing the charge as soon as the law permits *unless* the charging party advises them not to do so. 29 C.F.R. §1601.12(b)(1)(iii). This regulation and the action of the EEOC prior to its formalization are entitled to great weight. *Griggs* v. *Duke Power Co., supra; Udall* v. *Tallman, supra.*

In the final analysis, this court's decision in *Crosslin* v. *Mountain States Tel. and Tel.*, 400 U.S. 1004 (1971) lays to rest the notion that Section 706(b) and (d) creates filing requirements which are jurisdictional in nature. In *Crosslin* this court indicated that its decision to remand to the district court was made in light of the arguments of the solicitor general that the failure of the charging party to resort to the state agency was due to advice from the EEOC. This disposition confirms the view that the defect here is not jurisdictional, for, as the Ninth Circuit in *Crosslin* had correctly noted, reliance on faulty advice cannot excuse a jurisdictional defect. Thus, by reversing the Ninth Circuit and suggesting that any defects in the administrative filing procedures could be cured by applying to the state agency *three years after* the alleged act of discrimination and after the EEOC had fully exhausted its process, this Court must have rejected the Ninth Circuit's view that Section 706(b) creates *jurisdictional* prerequisites to federal action.

II.

Since the Technical Filing Defects, If Any, Were Due to the Action or Inaction of the EEOC Petitioner May Not Be Penalized by Loss of His Right to Maintain an Action in the Federal Courts.

As we have shown, the statute permits persons seeking to assert federal rights under Title VII to invoke the aid of the EEOC in securing those rights prior to contacting any state or local agency. The EEOC has by regulation undertaken to protect complainants who apply to it for aid and to act in a manner consistent with the protection of their federal rights. The EEOC has at all times held itself and its procedures out as adequate to satisfy the requirements of Section 706(b) and (d).

In the instant case Petitioner sought the aid of the EEOC, and followed all advice and instructions given to him by that agency. The EEOC undertook by its regulation and by its actions the obligation of protecting Petitioner's federal cause of action. The EEOC undertook to make certain that Petitioner did not become ensnared in the intricacies of Section 706(b) and (d) and the Petitioner relied upon the EEOC to accomplish this purpose. As a lay person Petitioner could not be expected to do more. Accordingly, to the extent that there were any defects in perfecting the filing of either the state or the federal administrative charge, those defects are attributable to the EEOC. Accordingly, under this Court's decision in *Crosslin* v. *Mountain States Tel. & Tel., supra,* Petitioner is not to be penalized, as the court below has done, by loss of his federal right of action. Rather, he is to be given the opportunity to cure any alleged defects in his claim, and upon such cure to proceed in the federal courts.

CONCLUSION

The procedures followed by Petitioner with the aid of EEOC amounted to substantial compliance with the requirements of Section 706(b) and (d). These procedures have now been formalized in EEOC regulations whose purpose is to simplify the bewildering language of these sections so that the lay persons who seek governmental aid in redressing their grievances concerning racial discrimination, can go to EEOC without loss of their rights.

The decision of the majority below, on the other hand, does not have a single consideration of law or policy on its side. To the contrary, the decision below needlessly calls into question the validity of thousands of complaints now pending before EEOC.

In these circumstances, we submit that the decision below must be reversed. If this Court agrees that Petitioner adequately complied with the statute's procedural provisions it should reverse and remand to the district court so that the litigation may proceed. If, on the other hand, the Court finds any irregularities in the administrative process, it should remand the case to the district court with instructions that Petitioner be allowed to cure these defects and then proceed with the litigation.

Respectfully submitted,

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LOVE *v.* PULLMAN CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 70–5033. Argued November 16, 1971—
Decided January 17, 1972*

Procedure whereby the Equal Employment Opportunity Commission (EEOC), after having received a written charge from a complainant of discrimination in violation of Title VII of the Civil Rights Act of 1964, orally referred it to the appropriate state agency, waited until that agency had terminated its jurisdiction, and then formally filed the charge on behalf of the complainant without having obtained an additional written charge within 30 days of the termination of the state proceedings *held* to satisfy the requirements of §§ 706 (b) and (d) of the Act which have the purpose of affording state agencies prior opportunity to consider discrimination complaints and ensuring their prompt filing and disposition by the EEOC on exhaustion of the state remedy. Pp. 523–527.

430 F. 2d 49, reversed.

STEWART, J., delivered the opinion of the Court, in which all members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the cases.

Hugh J. McClearn argued the cause for petitioner in No. 70–5033. With him on the brief was *Gail L. Ireland*. *Deputy Solicitor General Wallace* argued the cause for the United States et al. With him on the brief were *Solicitor General Griswold, Acting Assistant Attorney General Norman, David L. Rose, Stanley Hebert*, and *Julia P. Cooper*.

Edward C. Eppich argued the cause and filed a brief for respondent in both cases.

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*Together with No. 70–37, *United States et al.* v. *Pullman Co.*, also on certiorari to the same court.

Nathaniel R. Jones filed a brief for the National Association for the Advancement of Colored People as *amicus curiae* urging reversal in No. 70–5033.

MR. JUSTICE STEWART delivered the opinion of the Court.

A person claiming to be aggrieved by a violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253,[1] may not maintain a suit for redress in federal district court until he has first unsuccessfully pursued certain avenues of potential administrative relief. In this litigation the petitioner employee filed a complaint in the United States District Court for the District of Colorado, alleging that his employer, the respondent Pullman Company, had engaged in employment practices violative of Title VII. The court dismissed the complaint, holding that the statutory prerequisites to the maintenance of the suit had not been met. The Court of Appeals affirmed, 430 F. 2d 49, and we granted certiorari to consider the question of federal law presented. 401 U. S. 907.

The petitioner was employed by the Pullman Company as a "porter-in-charge." In 1963 and again in 1965, he complained to the Colorado Civil Rights Commission, alleging that the porters-in-charge, most of whom, like the petitioner, were Negroes, performed the same functions as conductors, most of whom were white, yet at lower pay. The proceedings of the Colorado Commission terminated in 1965 without reaching a resolution of the controversy satisfactory to the petitioner. On May 23, 1966, the Equal Employment Opportunity Commission received from the petitioner a "letter of inquiry" which complained of this same alleged discrim-

[1] §§ 701–716 (c), 42 U. S. C. §§ 2000e to 2000e–15.

ination. In accord with its usual practice,[2] the Commission treated this letter as a complaint but did not formally file it. Instead, to insure compliance with Title VII's procedural requirements, EEOC orally advised the Colorado Commission that it had received a complaint from the petitioner. By letter of June 1, 1966, the Colorado Commission informed EEOC that it waived the opportunity to take further action on the petitioner's grievance, and the EEOC then proceeded with its own investigation. The investigation resulted in a finding of probable cause to believe that the charge of discrimination was true, but the EEOC was unsuccessful in its attempts to obtain Pullman's voluntary compliance. This lawsuit followed.

The basis for the holding of the Court of Appeals was its finding that the charge of discrimination had not been "filed" with EEOC by the petitioner in conformity with the requirements of the Act.[3] Two such requirements are critical here. Section 706 (b) of the Act, 42 U. S. C. § 2000e–5 (b), provides that where there exists a state or local agency authorized to grant or seek relief against

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[2] 29 CFR § 1601.11 (b) (1971) provides:

"[A] charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. . . ."

[3] The Court of Appeals first adopted the reasoning of the District Court: The state commission had terminated the proceedings initiated by petitioner in July 1965, and petitioner failed to complain to the EEOC within the 30-day time period prescribed in § 706 (d), 42 U. S. C. § 2000e–5 (d). Regarding this statutory time requirement as jurisdictional, the District Court dismissed the complaint. When the Government entered the case on a petition for rehearing to the Court of Appeals, it pointed out that Title VII had not gone into effect at the time of the events underlying petitioner's applications to the state commission. Thus, the state commission's termination of proceedings in 1965 did not toll the 30-day period for appeal to the EEOC.

employment discrimination, "no charge may be filed [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . ." Section 706 (d), 42 U. S. C. § 2000e–5 (d), requires that the complaint to the EEOC "shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier . . . ."

The EEOC takes the position that these requirements were fulfilled by the procedure followed here, whereby a charge filed with the EEOC prior to exhaustion of the state remedy was referred by it to the state agency, and then formally filed once the state agency indicated that it would decline to take action. The Court of Appeals, on the other hand, regarded this procedure as a "manipulation of the filing date," not contemplated or permitted by the statute or by the EEOC regulations then in force.

We hold that the filing procedure followed here fully complied with the intent of the Act, and we thus reverse the judgment of the Court of Appeals. Nothing in the Act suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself, nor is there any requirement that the complaint to the state agency be made in writing rather than by oral referral.[4]

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[4] Respondent cites the following language of § 706 (b), 42 U. S. C. § 2000e–5 (b):

"If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been

Further, we cannot agree with the respondent's claim that the EEOC may not properly hold a complaint in "suspended animation," automatically filing it upon termination of the state proceedings.[5]

We see no reason why further action by the aggrieved party should be required. The procedure complies with the purpose both of § 706 (b), to give state agencies a prior opportunity to consider discrimination complaints, and of § 706 (d), to ensure expedition in the filing and handling of those complaints. The respondent makes no showing of prejudice to its interests. To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality.[6]

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commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."

Nothing in this language implies that a state proceeding may not be commenced by an oral complaint; the statute guards against state proceedings that are difficult to commence, not against ones that are easily begun.

[5] The Court of Appeals expressed concern that if EEOC could ignore the requirement of 29 CFR § 1601.11 (b) (1971) that a charge is deemed filed when received, it could file any complaint whenever it chose, thereby nullifying the various statutory time requirements. But the statutory prohibition of § 706 (b) against filing charges that have not been referred to a state or local authority necessarily creates an exception to the regulation requiring filing on receipt.

[6] See Comment, A Look at *Love v. Pullman*, 37 U. Chi. L. Rev. 181, 188 (1969). When a member of EEOC, rather than an aggrieved party, files a complaint with EEOC, "the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days . . . to remedy the practice alleged." Title VII, § 706 (c), 42 U. S. C. § 2000e–5 (c). It is clear that Congress found nothing wrong, in this circumstance, with EEOC's holding the charge in abeyance until a state agency is given the chance to act. There is no reason to think that Congress would disapprove this procedure when complaints are initiated by

Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.

The judgment is

Reversed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

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aggrieved parties; the difference in wording between § 706 (b) and § 706 (c) seems to be only a reflection of the different persons who initiate the charge. Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1214 n. 117 (1971).